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U. S. SUPREME COURT.

OCTOBER TERM, 1904. NO. 512.

EDWARD H. HARRIMAN ET AL.

vs.

NORTHERN SECURITIES COMPANY.

BRIEF OF MR. ROOT AND MR. STETSON.

CORRECTIONS AND ADDITION.

Page 85. The *third* sentence should read as follows:

"It cannot be that the defendant takes an unfair advantage of the complainants in retaining the exact consideration that originally was considered and declared by both parties to be fair, especially as since that time the Securities Company's stock has advanced in market value. (See *post* p. 112)."

Page 123. The *fifth* sentence should read as follows:

"This assertion, though ill-founded, is not equivalent to, but excludes, the contention that there was a very different agreement".

In continuation of the first subdivision of the *Seventh Point* of our *Brief* (p. 86), and in further answer to complainant's proposition (p. 150) that an admitted mutual mistake of law affords a distinct ground of relief in equity, we would call special attention to the case of *Midland Great Western Ry. vs. Johnson* (6 H. L. Cases, 798, 810).

It was there held that :

" Mistake as to a contract is a ground for equitable relief, but it must be a mistake in fact, not in law.

" Mutual mistake as to its construction will not entitle either party to relief in equity."

Accordingly, the House of Lords overruled the decree of the Lord Chancellor of Ireland, based upon the contrary theory.

The Lord Chancellor of England (CHELMSFORD) in the following language (pp. 810–811), stated and refuted the position taken by the Lord Chancellor of Ireland thus :

" He observes, ' they say, " true it is that on the strict letter of this contract we are not able to get back this money, but, what we urge here is, not that we are to have a performance of that contract, but that it is inequitable for you to rely on it, having regard to what has occurred, for we are placed in the position that we have been induced to lay out a large sum on the improvement of the stock belonging to you, the advantage of which expenditure we have given under the belief that we were entitled to the portion we claim out of this fund if we could make a case showing that we had made an equivalent expenditure. We have made such a case ; we have acted for your benefit ; and you still possess the benefit of our acts. All this was induced by letters, valuations and accounts, in which you and your agents spoke and acted, so as to create the belief under which we acted, and you therefore must not rely on the strict legal construction of the deed ; for, by so doing, you would obtain the same advantage twice over." '

" With very great respect to the Lord Chancellor of Ireland, this appears to me to open an entirely new head of equity. Mistake is undoubtedly one of the grounds for equitable interference and relief ; but then it must be a mistake not in matters of law, but a mistake of facts. The construction of a contract is clearly matter of law ; and if a party acts upon a mistaken view of his rights under a contract, he is no more entitled to relief in equity than he would be in law."

Lord WENSLEYDALE said (p. 821):

"There is equally an end of any ground for altering the original contract between the parties. It was not at first pretended that it did not express the real intention of the parties. And although it might appear that the parties had a mistaken view of the nature of the contract they had entered into, that would not entitle the respondents to any relief in equity unless they can show that it is a contract that did not really represent the intention of the parties at the time. And that I have disposed of already."

Washington, 28 Feby 1905.

ELIHU ROOT
FRANCIS LYNDE STETSON
of Counsel for Respondent.

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Supreme Court of the United States,

OCTOBER TERM, 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,
Petitioners,

VERSUS

NORTHERN SECURITIES COMPANY, impleaded with NORTHERN PACIFIC RAILWAY COMPANY,
Respondent.

No. 512.
February 1905.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

The decree brought up for review reverses a decree of the Circuit Court for the District of New Jersey, restraining the Northern Securities Company from dividing its assets ratably among its stockholders.

BRIEF FOR RESPONDENT

The present controversy developed immediately upon the attempt of the respondent, upon March 21, 1904, to conform to the condition resulting from the decree of the Circuit Court of the United States for the District of Minnesota in the Government suit against the Northern Securities Company (120 Fed. Rep. 721; R. p. 150) as affirmed by this Court (193 U. S. 197) March 14, 1904.

While the more prominent facts exhibited in that suit, probably are still familiar to this Court, it is assumed that at this point it may be helpful to summarize some matters, which bear particularly upon the present contention.

During all the transactions involved in this controversy, the Northern Pacific Railway Company* owned and operated the trunk line of railway and branches in the several States from Lake Superior to Portland, Oregon, and to the Pacific Coast. Jointly with the Great Northern Railway Company,* it was the owner of substantially all of the capital stock of the Chicago, Burlington & Quincy Railroad Company. In conjunction with the Great Northern Company, it controlled the operation of the many lines of the Burlington Company (R. 172)* extending into and through the States of Illinois, Wisconsin, Minnesota, Iowa, Missouri, South Dakota, Nebraska, Montana, Wyoming and Colorado.

During the same period, the Union Pacific Railway Company* owned and operated, or controlled the operation of, the several lines of railroad comprising the Union Pacific Railway System. The Union Pacific Railway System included the Union Pacific Railway, the railroad of the Oregon Short Line Railroad Company,* and the railroad of the Oregon Railroad & Navigation Company.* The Union Pacific Company is the owner of practically the entire capital stock of the Oregon Short Line Railroad Company (R. p. 194), and the latter company in turn is the owner of practically the entire capital stock of the Oregon Railway & Navigation Company (R. p. 198). The three named railroads in the Union Pacific System extend from the Missouri River westward through the States of Nebraska, Kansas, Wyoming, Colorado, Montana,

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* The affidavit of Mr. Nichols in the present Record states tha the line of all these railroads is "accurately shown upon the map "Exhibit 13 opposite page 662 of volume one of the record in the "suit of the United States against Northern Securities Company "and others to which reference hereby is made." (R. p. 279.)

Idaho, Utah, Washington and Oregon, to the Pacific Coast at Portland.

Between Chicago and Portland by means of connecting roads, and between Butte, Montana, and Portland and many intermediate points, and between Butte, Montana, and Missouri River points, there is sharp competition between the Northern Pacific System and the Union Pacific System.

The situation as above described continues to exist to the present date, (R. 279) and in the States of Montana, Idaho, Washington and Oregon, the railways of the Union Pacific System are active competitors of the Northern Pacific Company for both east and west bound traffic, and in traffic within and between the States of Nebraska, Wyoming, Colorado and Montana, they are active competitors for traffic with the Chicago, Burlington & Quincy Railroad. Thus it is true beyond dispute that the Union Pacific Railway *System* and the Northern Pacific Railway *System* are within a large section of the country parallel and competing lines of railway; and, brushing aside the fiction of the separate entity of a corporation from the body of its stockholders, it will be manifest that the purposes and acts of the Oregon Short Line Railroad Company (one of the complainants herein and the equitable owner of the subject matter of this suit) were in fact the purposes and acts of the Union Pacific Railway Company, the corporation which dominates the Union Pacific System.

Even without the special proof presented by the record of the competitive character of the two systems (R. pp. 171, 173, 175, 207, 217, 279, 67, 88, 104), the Court would take notice of the geography of the country, of the location of the prominent transportation systems mentioned and whether or not they are parallel and naturally competitive (*Gulf, &c., R. R. v. State*, 72 Tex., 404, 10 S. W. 81; *Miller v. Texas, &c., R. R.*, 83 Tex. 518, 18 S. W. 954) as well as of the laws of the States mentioned and of the United States on the subject of railway combination.

In the year 1901, the Northern Pacific Railway Company had issued, and there was outstanding, a total capital stock of $155,000,000, of which $75,000,000 was preferred stock and $80,000,000 was common stock. (R. 157.) The preferred stock was subject to redemption at the option of the Company (R. 283), and, as hereinafter more particularly described, it was so redeemed and retired on January 1, 1902 (R. 168). Since that date there has been no preferred stock, but an equal amount of new common stock was then issued and sold to the holders of its original common stock, so that the capital stock is still $155,000,000, but all of common stock.

From the time of its reorganization in 1896, the Northern Pacific Railway had been managed by directors generally recognized as friendly to Messrs. J. P. Morgan & Co., the managers of the reorganization. (R. 167; 204.) During the same period the Great Northern Railway Company was managed by directors generally recognized as friendly to Mr. James J. Hill, the President of the Company. For present purposes, we may style the Northern Pacific interests "the Morgan party", and the Great Northern interests "the Hill party" and the two collectively "the Morgan-Hill party" as they were termed in the Government suit.

Upon the acquisition of the Chicago, Burlington & Quincy shares by the Northern Pacific and Great Northern Companies in April, 1901, the interests in control of the Union Pacific System, which may be called the Harriman interests, immediately recognized how effective and lasting thereafter would become the competition with the Union Pacific lines of the Burlington road when operated in conjunction with the Northern Pacific and Great Northern trans-country routes. (R. 217.) Becoming alarmed at the probable effect thereof, the Harriman interests made overtures to the Morgan-Hill party for an allotment of a portion of the Burlington shares, so that they might have voice and influence in the

management of the Burlington and thereby be enabled to protect and to promote the business of the Union Pacific Railway. For manifest reasons this proposition of the rival and unfriendly line was not acceptable to the Morgan-Hill party, and the request was refused. Following this refusal, and shortly before May 10, 1901, at the instance of the Union Pacific Railway Company and with borrowed money furnished by that Company (R. pp. 194–196) the Oregon Short Line Company in the open market purchased Northern Pacific preferred stock to the amount of $41,085,000 and common stock to the amount of $37,023,000, or in the aggregate $78,108,000 of stock, being a clear majority of the $155,000,000 total capital stock of the Northern Pacific Company as then issued and outstanding (R. 157). But, those making these purchases with a view to the control of the Northern Pacific road (R. p. 240) had disregarded the fact before mentioned, that the preferred stock was subject to retirement at par at the option of the Company, and the 370,230 shares of common stock so purchased was less than a majority of 800,000 shares of the total common stock controlling the redemption of the preferred stock (R. p. 236, 157). Within a few days previous to May 10, 1901, learning the extent and the nature of these purchases of Northern Pacific stock and appreciating the injury to the Northern Pacific likely to result from ownership of a majority of the shares in the interest of the Union Pacific, Messrs. Hill and Morgan and their friends undertook similarly to increase their holdings of Northern Pacific common stock by purchases in the open market to an extent which would assure to them a majority of the common stock and the control of the Company after the preferred stock should have been retired (R. p. 175). Upon cessation of the competitive buying, the Morgan-Hill party held about 420,000 common shares as against less than 380,000 such shares held by the Harriman interests (R. 157).

These enormous purchases by the rival interests became known to the public through the startling and unprecedented market movement of the Northern Pacific issues, and in financial circles gave rise to an anxiety so acute, and a fear of untoward consequences so widespread, that there resulted in the securities markets a most disastrous panic, since known as the "Northern Pacific corner" or the "panic of May, 1901," when urgent bidders on the New York Stock Exchange bought in Northern Pacific common at exorbitant prices, in some instances equal to ten times the par of the shares.

These attempts on the part of the Union Pacific to obtain control of the Northern Pacific Railroad, find their latest development in the case at bar. The various matters and events thus far recited will readily recur because of their relation to the facts appearing in the record in the Government suit.

From the panic of May 9, 1901, we may pass now over the months following until October in the same year. On the first day of that month, the complainant Harriman was elected, and Mr. James Stillman was re-elected, as a member of the Board of Directors of the Northern Pacific Railway Company (R. p. 281). Each was a director of the Union Pacific Railway Company and both attended the meeting of the Northern Pacific Board held on November 13, 1901, when Harriman was chosen a member of the Executive Committee (R. pp. 281–282).

At this meeting of the Northern Pacific board held November 13, 1901, the Union Pacific representatives being present as aforesaid, there were duly adopted, by the affirmative vote of all present, resolutions providing for, and in due course resulting in, the retirement of the preferred stock upon January 1, 1902 (R. pp. 168, 282). These resolutions declared that the Company thereby determined to exercise its right to retire the preferred stock; provided that for the purpose of raising the funds necessary so to do, the Company should issue its negotiable bonds for $75,000,000, convertible at par

into shares of the common stock of the Company at par; authorized the making of a contract for the sale of all of such bonds at par and accrued interest, the contract to contain a provision giving to the holder of every share of the common stock the opportunity to receive from the contract purchaser, at par and interest, such bonds to an amount equal to 75/80ths of the par amount of said common stock at such time owned by such holder; and finally arranged for the retirement from and after December 31, 1901, of the $75,000,000 preferred stock, by the payment to each and every holder of record thereof upon January 1, 1902, of $100 cash for each and every share (R. p. 281, 283-286).

The resolutions expressly excluded the preferred stockholders from any opportunity to convert their preferred stock, and such exclusion was upheld by the Supreme Court of New York (*Hackett v. Northern Pacific Ry.* 36 Misc. Rep. 583; Appendix p. 376).

On November 15, the Executive Committee of the Northern Pacific Company met and authorized the execution of a contract with The Standard Trust Company of New York for the sale and delivery of the convertible certificates for $75,000,000 as provided in the directors' resolution last above recited. (R. p. 287, 290–293.) On November 18, the Executive Committee again met, Mr. Harriman being present, and took further proceedings toward the accomplishment of the preferred stock retirement (R. p. 293–6).

Mr. Harriman's explanation of the circumstances eventuating in this surprising result are set forth in his affidavit filed in support of his prayer for the preliminary injunction. It runs as follows (R., p. 155, 158–159):

"My conversations on the subject were with Mr. Morgan, Mr. Steele, Mr. Bacon and Mr. Perkins, members of said firm, but I cannot remember exactly what each said, and at the present time can only recollect the substance and result of my conversations with them.

"I was then urged by Messrs. Morgan & Co. to dispose of the Northern Pacific stock held by the Oregon Short Line Company on the ground that it would be a minority holding under the plan of conversion if consummated, that the majority would be held by the holding company, and that there would probably be no market for any such minority holding. They further stated that upon the organization of the proposed holding company, they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line and to pay therefor in the stock of the holding company at the rate of 115 for all our stock, which would be the rate at which the holding company would take in the common stock held by them and Mr. Hill and his associates, and all other parties, and they thereupon offered me those terms. I took the matter under consideration and conferred with members of the board of directors of the Oregon Short Line Company. The conversion under conditions reducing the Oregon Short Line holdings to a minority was then a foregone conclusion unless we were prepared to commence litigation, which would be protracted and which would probably be detrimental to the value of all railroad securities in view of the condition of the financial markets resulting from the panic of May 9, 1901. The alternative of not accepting shares of the holding company, but holding the minority interest in the Northern Pacific Company, involved serious risks of great loss, as it would then be to the interest of the holding company to sacrifice the Northern Pacific for the benefit of the Great Northern Company. It was, therefore, finally agreed with Messrs. J. P. Morgan & Co. that the Oregon Short Line Company would turn over its entire holdings of Northern Pacific stock for $82,491,871 par value of the stock of the holding company and $8,915,629 in cash."

The exact date of these negotiations is not fixed by Mr. Harriman, but presumably they took place shortly before November 13, 1901 (R. p. 211). Upon the subject of these conferences, the testimony of the members of the firm of Messrs. J. P. Morgan & Co. appears in the present record only by extracts from their testimony in the Government suit annexed to the affidavit of Mr. Winslow S. Pierce, and forming

part of the complainant's proofs (R. p. 161, 163–176). However, it is clear that on the part of Messrs. J. P. Morgan & Co.—who, according to the Mr. Harriman's affidavit, alone appeared as purchasers (R. p. 205, 213, 234)—there was no exaction or request, but simply an offer, to obtain for Harriman and Pierce terms as good as (and ultimately made better than) those offered to any other holder of Northern Pacific shares. The offer was accompanied not by any threat or by any intimation that the holding company would require the shares, but merely by observation of the obvious fact that there might be no profitable market for minority shares (R. p. 165, 158). Mr. Harriman seems to have been governed not by any consideration of this suggestion, but by his own idea that unless he sold "it would be to the in- "terest of the holding company to sacrifice the North- "ern Pacific for the benefit of the Great Northern Com- "pany" (R. p. 158). It was therefore finally agreed to sell.

The Northern Securities Company was formed by the filing of articles of association at Trenton on the 13th of November, 1901 (R. p. 302). Shortly before the filing of the articles, the complainant Winslow S. Pierce, attended a meeting of counsel for the purpose of considering the incorporation. Mr. Pierce, in his affidavit filed by the complainants, describes the circumstance as follows (R. p. 185–186):

"Referring to my affidavit, verified May 16, 1904, in this suit, my attention has been called to the fact that after the arrangement with Messrs. J. P. Morgan & Co. to accept shares of the holding company for the Northern Pacific stock held by the Oregon Short Line Company, as stated in Mr. Harriman's affidavit of May 16, 1904, and shortly before the organization of the Northern Securities Company (the exact date I do not recollect), I attended a meeting at which were present counsel representing Mr. Hill and his associates, counsel representing Messrs. J. P. Morgan & Co., and counsel representing the Oregon Short Line interests. At such meeting a form of certificate of incorporation of a holding company was submitted by counsel representing Mr. Hill and was discussed. The form thus sub-

mitted and discussed was to the best of my recollection substantially the same as that subsequently used in the incorporation of the Northern Securities Company. The formation of the holding company had been previously decided upon by interests other than our own and in the decision to form such a company I had no part."

The articles of association of the Northern Securities Company were signed by three incorporators, who constituted the first board of directors and who resigned the next day. On that day, the 14th of November, 1901, one share of stock was placed in the name of each of fifteen gentlemen who were to constitute the permanent board of directors (R. p. 307). Of these 15 one was Mr. Harriman. One was Mr. James J. Hill, the president of the Great Northern Company. Two others, Messrs. Schiff and Stillman, were directors with Mr. Harriman in the Union Pacific board. Two others, Messrs. Bacon and Perkins, were members of the firm of J. P. Morgan & Company. Five of the others appear among the individual defendants in the Government suit. Thereupon on the same 14th of November all of the 15 were elected directors of the Northern Securities Company (R. p. 308, 309). It appears by the minutes that upon being elected Mr. Harriman forthwith appeared and accepted his election as director, and took his seat in the board (R. p. 309). On the same 14th of November an executive committee of five was elected, Mr. Harriman being one of the five (R. p. 311). On the same day, the executive officers who have managed the company throughout its existence were elected by the votes of all including Messrs. Harriman and Stillman (R. p. 310).

On the next day, the 15th of November, the board passed resolutions authorizing the purchase of the Harriman-Pierce Northern Pacific stock upon the terms set forth therein. The statement and resolutions were as follows (R. p. 311–312; 270–271; 331–333):

"The President stated that he now had an opportunity of acquiring $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred

stock, of the Northern Pacific Railway Company, at an aggregate price of $91,407,500, payable, as to $82,491,871, in the fully paid-up and non-assessable shares of this company at par, and, as to the remaining $8,915,629, in cash.

"On motion, and by affirmative vote of all the Directors present, it was

"*Resolved*, That the President be, and hereby he is, authorized in behalf of this company, to purchase said stock—namely, $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company—at an aggregate price of $91,407,500, payable as to $82,491,871 thereof in the fully paid-up and non-assessable shares of the capital stock of this company at par, and as to $8,915,629 in cash; and that the officers of this company be, and hereby they are, authorized to issue fully paid-up and non-assessable shares of stock of this company to the amount of $82,491,871, and to pay $8,915,629 in cash, in consideration of such $37,023,000 of the common stock and $41,085,000 of the preferred stock of the Northern Pacific Railway Company."

"*Resolved*, That the President be, and hereby he is, authorized at any time to retire at par, for cash, any and all preferred stock of the Northern Pacific Railway Company that may be acquired by this company, and in case such retirement shall be effected prior to January 1, 1902, to allow interest up to January 1, 1902, at the rate of four per cent. per annum, on the sum receivable for such preferred stock.

"*Resolved*, That the President be, and hereby he is, authorized in behalf of this company to purchase at their par value an amount of the convertible certificates of the Northern Pacific Railway Company, to be issued pursuant to the resolutions of the Board of Directors of the Northern Pacific Railway Company passed November 13, 1901, equal to seventy-five eightieths of the par amount of any and all common stock of the Northern Pacific Railway Company that shall have been acquired by this company.

"*Resolved*, That the President be, and hereby he is, authorized, in case of the purchase by this company of any of the convertible certificates of the Northern Pacific Railway Company, to convert the same into common stock of the Northern Pacific Railway Company whenever such conversion may be effected.

"*Resolved*, That the President be, and hereby he is, authorized to borrow, on such terms as he may ar-

range, any moneys required for the purpose of carrying out the foregoing resolutions, and to make all financial arrangements, and to do all acts and things, which he may deem needful in the premises."

Mr. Harriman and the other Union Pacific interests remained absent from that meeting, but at the next meeting of the board on the 19th of November following, Mr. Harriman, Mr. Schiff and Mr. Stillman all being present, the minutes of the meeting of the 15th were read and on motion were approved. (R. p. 312).

In the meantime (on the 18th of November) the resolution had been effectuated by Harriman and Pierce delivering their Northern Pacific stock to the defendant and by the defendant delivering to Harriman and Pierce the 824,000 shares of defendant's stock and $8,915,629 in cash. (R. p. 5).

At the same meeting on the 19th of November, Messrs. Harriman, Schiff and Stillman being present, a form of by-laws for the company was read, amended and adopted. (R. p. 312). On the 27th of November, the organization of the company was completed at a meeting of the Executive Committee in which Mr. Harriman participated, when the rules of procedure of the Executive Committee were adopted and the form of the company's permanent stock certificate was unanimously approved (R. p. 312–318). The stock certificate is in the usual form, and is set forth in full in the opinion of the Circuit Court of Appeals (R., 388) and also in the Directors' Minutes. (R. p. 317).

Continuously from that time Mr. Harriman has acted as a member of the Board of Directors and of the Executive Committee of the Northern Securities Company.

The Northern Pacific stock certificates received from Harriman and Pierce were by the Securities Company surrendered to the Northern Pacific Railway Company and have ceased to exist. The certificates for the 370,230 shares of common stock

were exchanged for 370,230 shares of common stock issued in the name of, and now held by, the Northern Securities Company. The certificates for the 410,850 shares of preferred stock were surrendered to the Northern Pacific Railway Company for retirement in pursuance of the preferred stock retirement proceedings of that Company above recited, and in exchange therefor the Northern Securities Company received $41,085,000 in cash (R. p. 265–266). After the surrender of the preferred stock as aforesaid, the Northern Securities Company purchased for cash at par, from the Northern Pacific Railway Company, the bonds of that company convertible at par into common stock, and by so converting the same it received from the Northern Pacific Railway Company certificates of new common stock to an amount equal to seventy-five eightieths of the number of shares of common stock delivered by Harriman and Pierce, to-wit, certificates for 347,090 shares of new common stock (R. p. 325–326). *Thus at cost to itself of $82,491,800 in its own stock, and a net cash sum of $2,539,691.50 over and above all cash by it received, the Northern Securities Company became the holder of certificates for 717,320 shares of Northern Pacific new common stock.* The certificates for all this new common stock now are, and for nearly three years have been, registered in the name of the Northern Securities Company, and none of them ever was held by any one of the complainants (R. p. 265).

From time to time after the 18th day of November, 1901, until shortly before the entry of the Circuit Court decree in the Government suit, the Northern Securities Company acquired from a large number of the owners of the stock of the Great Northern Railway Company, acting separately, a large majority of its stock, and prior to the 8th day of March, 1903, the Northern Securities Company acquired from a very large number of separate individual owners thereof $82,027,362.50 par value of the common stock of the Northern Pacific Railway Company. (R., p. 265–266).

From the minutes of the Northern Securities Company, it appears that on the 22d day of January, 1903, the board of Directors of that company, Messrs. Harriman, Schiff and Stillman being present and taking part in the meeting, and no negative vote being recorded, approved the sale by the company itself for cash at a price much above par of 75,000 shares of Northern Securities stock (R. p. 317–318). The purchasers of these shares parted with their money in exchange for a ratable interest in all the corporate assets of the Northern Securities Company, including the Northern Pacific stock transferred to that company by the complainants, and they acquired no other rights whatever. (R. 272, 275, 266, 278–9.) For more than a year after the original transaction, the Union Pacific representatives in the Securities Board of Directors accepted responsibility for the sale of ratable interests to the public purchasing Northern Securities shares.

During all the period from the organization of the Securities Company until the affirmance of the decree in the Government suit, the complainants continued to exercise the rights of holders of 824,000 shares of stock in the Securities Company; they received their share of such dividends as were declared by the company, and they gave their proxy to vote at the annual meetings of 1902 and 1903 (R. p. 320).

Four months after the filing of the bill in the Government suit, Harriman and Pierce and the Oregon Short Line Company, on the 17th day of July, 1902, further asserted their rights of ownership over the 824,000 shares of stock of the Northern Securities Company, by pledging that stock to the Equitable Trust Company under the trust indenture set out in the bill of complaint. The terms of the indenture show that then they transferred to every holder of the bonds issued thereunder a part of their interest in the general assets of the Northern Securities Company represented by the pledged stock, for the indenture assures to the bondholders not merely payment of interest upon the bonds, but a pro-

portionate share of all the dividends paid by the Northern Securities Company upon the stock pledged (R. pp. 31, 33, 45, 46). This trust indenture provided not only for the issue of bonds in respect of the stock immediately pledged, but further authorized the issue thereunder of additional bonds to an aggregate amount limited only by the par value of all stock of the Northern Securities Company that might be deposited with the trustee, thus disclosing an expectation that the Oregon Short Line Railroad Company might acquire and pledge any and all other shares of the Northern Securities Company even up to the total authorized capital of that company.

The bill on behalf of the Government was filed by the Attorney General upon March 10, 1902. Previously thereto, on January 25, Mr. Harriman had been summoned before the Interstate Commerce Commission and had been examined by the Solicitor General concerning the Securities Company and the railroad interests represented therein. His testimony on this occasion was subsequently introduced in evidence in the Government suit (R. p. 190). Being given *ante litem* and within two months of the transaction, it is most important. The following, portions of the deposition, are directly material to the present controversy.

MR. DAY: Did you attach to your negotiation for the sale of Northern Pacific stock, any other condition than the one of the money price?

MR. HARRIMAN: No, sir.

MR. DAY: No other conditions?

MR. HARRIMAN: No other conditions that I remember.

MR. DAY: No other conditions except the one of the money price?

MR. HARRIMAN: I do not remember any condition of the Union Pacific or Oregon Short Line, in any way (R. 208-209).

* * * * * *

"MR. HARRIMAN: The transaction was complete" (R. p. 210).

* * * * * *

MR. DAY: You told Commissioner Prouty, in reply to a question propounded by Commissioner Prouty respecting your reasons for the sale of this seventy-eight millions of stock so shortly after you purchased it, that the Union Pacific had accomplished its object in the purchase. What was that object, or how did you accomplish that object? What assurance have you that you have accomplished it, if that was the only object? What assurances were given you by any one respecting the future conduct of the Northern Pacific or those avenues of communication between it and the Oregon Short Line or the Union Pacific?

MR. HARRIMAN: I do not presume that it would be possible for any individual or any combination to give any promise that would be a security to anybody else in the affairs of the operation of any railroad, the Northern Pacific or any other. *For instance, these people who purchased the Northern Pacific might sell the stock to-morrow or before the next election, and still whatever assurances there were would be of no avail.*

MR. DAY: Were there any assurances?

MR. HARRIMAN: No, sir.

MR. DAY: None at all.

MR. HARRIMAN: No, sir.

MR. DAY: Directly or indirectly, controlling the operation of the Northern Pacific?

MR. HARRIMAN: That covers a great deal of ground. We had many conferences as to what the movement by various lines would be, and, considering the whole question, the Union Pacific management determined that it was no longer necessary, as it was believed that it would be to the interest of the Northern Pacific to use the avenues open over the Northern Pacific as it had before, notwithstanding it had purchased the Burlington.

MR. DAY: Were any assurance given you regarding the future relations of the Burlington road with the Union Pacific?

MR. HARRIMAN: No, sir.

MR. DAY: Nothing said in respect to that, as to how it should be conducted and used?

MR. HARRIMAN: The Burlington touches the Union Pacific lines at a great many points.

MR. HARRIMAN: I should think it did.

MR. DAY: You asked no assurances regarding that and received none?

MR. HARRIMAN: No, sir.

MR. DAY: Was any inducement held out to you to enter the Northern Securities Company or to take any interest in that?

MR. HARRIMAN: No, sir.

MR. DAY: By any of these gentlemen?

MR. HARRIMAN: No, sir. (R., 206–207.)

* * * * * *

MR. DAY: What were the terms reported to it (the Oregon Short Line)?

MR. HARRIMAN: *The sale of the stock.*

MR. DAY: What were the terms of it?

MR. HARRIMAN: You mean what price we got?

MR. DAY: I do not care about the price, but the terms—the conditions of the sale.

MR. HARRIMAN: *No conditions.* (R. p. 199).

* * * * * *

MR. DAY: Pending the negotiations for the sale of the $78,000,000 of Northern Pacific stock, which has been referred to, and the questions which arose respecting it from time to time among your associates, who acted as your legal counsel?

MR. HARRIMAN: Mr. Pierce.

MR. DAY: On what basis was such portion of the $78,000,000 as was taken in exchange or exchanged for Northern Securities stock based or taken? What was the basis of the exchange?

MR. HARRIMAN: We made no exchange.

MR. DAY: I thought you said—

MR. HARRIMAN: No. We had no transaction whatever. I think you have got a wrong impression. We had no transaction whatever with the Northern Securities Company. (R. 213).

* * * * * *

MR. DAY: I understood you to say that you took some Northern Securities in part payment.

MR. HARRIMAN: Yes, sir, in lieu of cash. We did not make any exchange.

MR. DAY: You did not subscribe?

MR. HARRIMAN: No, sir, we had no transactions with them. (R. 214).

* * * * * *

MR. DAY: Then I asked if you did rely upon the statement that a Securities Company was to be formed?

MR. HARRIMAN: In making the sale?

MR. DAY: Yes, sir.

MR. HARRIMAN: No.

MR. DAY: I do not mean that that was the moving consideration. Would you feel that you had a cause of complaint against the gentlemen you were negotiating with if that stock had not been put into the Northern Securities Company?

MR. HARRIMAN: I do not think we would; I do not know any reason why we should. (R. 215).

* * * * * *

THE CHAIRMAN: As I understand Mr. Harriman, he said he negotiated the sale of this Northern Pacific stock when his company decided that it was best to sell it. He reported the terms to his company and they ratified the arrangement.

MR. HARRIMAN: Yes, sir.

THE CHAIRMAN: That arrangement fixed a price, and part of it was to be paid in money and the balance in securities, and included in those securities was an agreement on your part to take a certain amount of the securities of the Northern Securities Company if organized on a certain basis?

MR. HARRIMAN: Yes, sir.

THE CHAIRMAN: Subsequently it was organized on that basis?

MR. HARRIMAN: And the stock was delivered and received.

THE CHAIRMAN: And you took the stock of the Northern Securities Company in payment of the Northern Pacific stock that you sold?

MR. HARRIMAN: Yes, sir. (R. 215).

* * * * * *

COM. CLEMENTS: When did you first seriously consider taking any stock in that company yourself or for the corporations you represent?

MR. HARRIMAN: Only when we sold the Northern Pacific stock. (R. 216).

In December, 1902, Mr. Harriman testified to similar effect in the suit of the State of Minnesota against the Northern Securities Company (R. p. 238): his testimony on that examination was incorporated in the record in the Government suit and appears in the present record at pp. 233 *et seq.*

The proceedings taken in the Government suit resulted, on or about April 9, 1903, in the decree therein

in favor of the United States of America and against the defendants in said suit. A copy of said decree is annexed to the bill as Exhibit D (R. p. 190). Upon or about the 14th of March, 1904, this decree was finally affirmed by this Court.

At this time the Northern Securities Company had issued and outstanding capital stock to the amount of $395,400,000, and was the holder of 1,537,594 shares of the capital stock of the Northern Pacific Railway Company, and 1,181,242 shares in the capital stock of the Great Northern Railway Company.

Immediately the Northern Securities Company in good faith undertook to conform to the decree.

Upon March 22, the Board of Directors adopted the resolutions set forth by the complainant as Article XIV. of the *second amended bill* (R. p. 9), quoted at length in the opinion of the Circuit Court of Appeals (R. p. 380), and forthwith caused a copy thereof with an explanatory letter (Exhibit A, R. p. 160) to be sent to the Attorney General.

Coincidently with the adoption of these resolutions of the directors, the Union Pacific party promptly set out to effect the long-coveted control of the Northern Pacific. The first move was made early in April, 1904, when the three principal complainants in the present case presented to the Circuit Court for the District of Minnesota, their petition for leave to intervene in the Government suit for the purpose of therein asserting their present contention. The grounds of this application were substantially the same as those upon which the present bill is founded. On April 12 and 13, 1904, argument was had at St. Paul upon the application, the Court, including three of the four learned Judges who had rendered the decree since affirmed by this Court. The Government appeared by the Attorney General and filed a declaration stating that it was satisfied with the relief already obtained. Upon April 19, 1904, the Court rendered its decision denying to the petitioner the prayed for leave to intervene.

The following, taken from the opinion of THAYER, J., constitute the Circuit Court's construction of the Circuit Court decree upon the former opinion which had been delivered by him (R., p. 367-368) :

"The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential. In its bill of complaint, the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued, and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The Court doubted its power to command stockholders of the Securities Company, who had not been served with process and were not before the court otherwise than by representation (if indeed they were present by representation) to surrender stock which was in their possession and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The Government was satisfied with the relief which it obtained and expresses itself as fully satisfied therewith at the present time. * * * It is true that the decree contained a provision, in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of the said railway companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become owners of its own stock originally issued in exchange for stock in the two railway companies. But this provision was merely permissive. It did not command that the stock should be so returned or exclude other methods of disposition of it that in view of all the circumstances, might appear to be more equitable. The fact that the directors of the Securities

Company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has become final by affirmance and make an order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do."

On April 20, 1904, the day following this denial of their petition to intervene in the Government suit, the complainants began the present suit in the District of New Jersey by filing their original bill of complaint against the Northern Securities Company as sole defendant; and thereupon and upon the affidavits and exhibits accompanying the same obtained from Circuit Judge KIRKPATRICK a temporary restraining order pending the hearing of the complainants' motion for a preliminary injunction. On April 26, the original bill was superseded by their first amended bill, including the Northern Pacific Railway Company as a defendant.

Upon this first amended bill and the affidavits and exhibits filed in connection therewith, the complainants' application for the preliminary injunction was heard by Circuit Judge BRADFORD on May 20, May 21 and May 23. *After the conclusion of that hearing the complainants filed their second amended bill.* On July 15, 1904, the Court made its decision allowing an interlocutory decree for a preliminary injunction (R. p. 344). On August 18, 1904, the complainants entered the decree which on January 3, 1905, was vacated by the Circuit Court of Appeals.

The opinion of Judge BRADFORD (Record pp. 321-344) contains not one word indicating any view upon the merits. The learned judge did not even find a *prima facie* case; he granted the preliminary injunction expressly and solely upon the grounds (R. p. 343)

that (1) there were ultimately to be determined questions which were grave and difficult, (2) the balance of inconvenience was in favor of the complainant, and (3) an appeal would lie from an interlocutory decree granting, but not from one denying, a preliminary injunction.

Upon the invitation extended by the last reason (3) so assigned by Judge BRADFORD, the Circuit Court of Appeals proceeded fully to consider the merits (R. p. 386–396) and reaching the conclusion that upon the allegations of the bill and indisputable facts, the Securities Company was owner of the Railway shares (R. p. 393), dissolved the preliminary injunction. Judge GRAY dissented in a short opinion (R. p. 396–7) without any consideration of the merits but solely upon the ground that the case was one in which the duty of the appellate court was merely to determine whether or not the sound judicial discretion of the court below had been abused.

In the meantime, the Continental Securities Company, a stockholder of the Northern Securities Company, had filed its bill (R. p. 245) in the New Jersey Court of Chancery to enjoin the proposed distribution but the application was denied by Vice Chancellor BERGEN (R. p. 257–263) who fully considered the merits and held *(1)* that the ownership of the railway stocks by the Northern Securities Company was not now questionable, and (2) that the proposed ratable distribution was authorized by the laws of New Jersey.

The decision of the Circuit Court of Appeals has now been brought to this Court for review upon *certiorari* issued upon a petition of the complainants in which among other things it was urged (Petition p. 12) that the Circuit Court of Appeals had erred "in "failing to give due effect to the decision of this Court "in the Government suit upon the same question of "ownership there presented upon the same proofs."

The present condition, then, is one in which (1) all parties agree that now is presented for consideration and final determination by this Court the question

whether the decree in the Government suit concerned and decided as between themselves the mutual rights of the parties to this suit, and also is one in which (2) the defendant, denying that such rights were there decided, contends that upon the facts indisputably established by incontestable depositions and documents in the present proceeding, the complainants are not entitled to reclaim the railway shares which voluntarily they sold and delivered to the defendant now holding the same, an immensely valuable consideration therefor having been received and retained and enjoyed for years by the complainants who have disposed of the same as their own property. The propriety of a review of the case as a whole is established by many decisions, but it is sufficient to refer by title to only a few. See *Green v. Mills*, 69 Fed. Rep. 852-860; *Knoxville v. Africa*, 77 Fed. Rep. 501; *Smith v. Vulcan Iron Works*, 165 U. S. 518-525; *Mast v. Stover*, 177 U. S. 485-494; *Castner v. Coffman*, 178 U. S. 168, 183.

The contentions of the defendant have been fully sustained by every court that has considered the merits at all, and have not been denied upon the merits by any court or judge.

The contrary contention of the complainants depends upon four principal propositions of which not one can be maintained :

1. That the Securities Company did not become the owner of the railway shares, but was only a trustee or bailee for the complainants :

2. That even though the Securities Company be considered to have been a purchaser of the railway shares, its purchase was upon a consideration which has failed, viz., an understanding that the Securities Company should continue permanently to hold such shares :

3. That upon general principles, the complainants are entitled to recover back property transferred by them in virtue of an illegal combination : and

4. That the property so transferred by the complainants should be deemed to include the new common stock which they never owned, because their transfer of preferred stock, since retired, was made upon the understanding that it was to be converted into new common stock.

By way of inducing a favorable consideration of their contention the complainants further assume to stand as the sole guardians of the former decree of this Court which they allege the defendant is now endeavoring to evade.

These several propositions may now be considered and refuted.

First.

The proposed ratable distribution is not an attempt to evade the decree of this court, which however would be nullified in principle were the complainants to consummate their unlawful purpose.

FIRST. *As to the ratable distribution proposed by defendants.*

In Article IV. of the petition for *certiorari* (p. 43) the complainants charge that "the probable effect" (of the plan proposed by defendant) "will be to "circumvent and defeat the intent and spirit of the "decree of this court in the Government suit." This charge means of course that the effect of the proposed ratable distribution would be to perpetuate the control of the two Northern railways in the hands of those who organized the combination condemned in the government suit.

To this charge there are several sufficient answers:

(1) The charge is not sustained, but is absolutely refuted, by the facts. These are fully shown by Mr. Nichols in his third affidavit (R. p. 264). To this affidavit the complainants make one and only one reply, viz., that Mr. Nichols testifies only as to what is shown by the transfer books, while it is common experience that the names of the true owners of stock do not always appear on the transfer books. But the complainants, who have freely examined the transfer books R. p. 182), do not deny that they sustain Mr. Nichols' affidavit, nor do they in one single instance venture to swear, even upon information and belief that any one or more of the alleged conspirators own one share in excess of the amounts stated on the transfer books. These entries, together with Mr. Nichols' affidavit, are not to be overthrown by mere suspicion and innuendo. This charge of the complainants is not founded on fact.

(2) But even though it be "probable" as matter of inference that ratable distribution would reinvest the alleged original conspirators with the control of the two Northern railways, it is inevitable as matter of experience, and not merely of inference, that to return the shares to the original depositors would certainly reinvest such control in those conspirators. If originally, without the aid of the complainants, the Hill-Morgan party were able to bring into the Northern Securities Company the controlling shares of each of the two Northern railways, it would seem to follow that their ability to control the two properties would be restored if all of such shares were to be returned to those who originally deposited them. Their capacity of control would be lessened only in part though in some instances the returns were not to original depositors, but to the transferees of original depositors in case of transfers.

Possibly the express permission to make such return may have been inserted in the Circuit Court decree, in order to relieve the individual defendants from the charge of contempt should they thus reinvest the original conspirators with their original control. It is true that such return would have been to each conspirator of his own stock in his own separate railway instead of an aliquot part in the shares of each of the two railways. But, no one pretends that any one or any two or all twelve of the original conspirators (R. p. 264) singly or together have ever owned a controlling interest in both railways or in either railway. This being so, it is a matter of indifference whether the return of all the shares in the two railways be made to the respective depositors, severally to each the particular stock deposited by him, or ratably to each both stocks according tohis present interests. Nothing in evasion of the decree could be done except by a new and unlawful conspiracy to control the railways. Such a conspiracy could be consummated by six Northern Pacific stockholders combining with six Great Northern stockholders, as readily as by twelve persons, each holding severally in each of those companies an amount of

stock equal in the aggregate to the separate holdings originally combined.

The absolute ineffectiveness of a ratable distribution in and of itself, as compared with a return to the original conspirators, as a means of perpetuating their control is so obvious, that there is no point to complainants' suggestion that there may be a present stock ownership different from that shown by the transfer books.

On the contrary the exhibition upon these books of 2,531 separate shareholders (R. p. 269, 364), of 16,000 transfers, and of 86,945 certificates (R. p. 266), attests the regularity of the books, the steady dispersion of the stock of the Securities Company, and the reasonable probability that a ratable distribution according to such widely extended interests would accord most nearly with the purposes of the Government which is the administrator of the anti-trust law and of the Courts that granted the decree in the Government suit. This condition was readily comprehended by the Government, and by the Attorney General, who, from the first fully advised of the present plan of ratable distribution, expressed himself satisfied. Nevertheless the brief of the complainants filed in support of their petition for *certiorari* suggests (p. 8) that he should not have been satisfied. "*The Attorney General, however, it is humbly conceived, may have been in error.*" But, the judgment of the Attorney General is that which must determine what is for the public interest and upon him the anti-trust act must rest for prosecutions for its enforcement (*Minnesota v. Northern Securities Co.*, 194 U. S., 48).

(3) Finally, it may be observed that under the decisions of this Court, and as matter of law, there is no valid objection to any transfer of the railway shares in any proportions to any person or persons as individuals not bound together by any agreement or conspiracy in restraint of trade. The opinions of this Court do not question, but on the contrary they affirm, the right of

any individual or individuals freely to acquire and to transfer property in absence of conspiracy or monopoly. Manifestly the dispersion of the railway shares among 2531 persons (R. p. 269, 364) would not aid in the creation of a monopoly or of an unlawful combination.

SECOND. *The disposition of the Northern Securities property preferred by complainants, being a delivery to themselves of 781,080 shares, an absolute majority of the total Northern Pacific stock, and a ratable distribution of the remaining assets to the other stockholders, is one which would directly and effectively contravene the object of the Sherman Anti-trust Law, and the purpose of the Government suit.*

Having in mind the extraordinary efforts and achievements of the Union Pacific party in the spring of 1901, in acquiring Northern Pacific shares of both classes in an aggregate amount exceeding $78,000,000 (and also exceeding one-half of the total Northern Pacific capital stock as then issued), and that the expenditure, for such a purpose unparalleled in the history of railroads, was made not out of surplus but out of moneys borrowed for the extraordinary purpose (R. p. 195),—certainly it cannot require either argument or the evidence in the record (p. 3 *infra*) to induce belief that in fact as well as in appearance the Northern Pacific System is competitive with the Union Pacific System, and, despite present professions, that it was so regarded by the Union Pacific managers (R. pp. 171, 207, 217). Neither can it require argument to satisfy the Court that these mighty and strenuous efforts of the Union Pacific party have been and are being put forth in the hope of being able to prevent or to smother the competition on the part of the Northern Pacific system and its connected Burlington system.

In effect it is conceded by the complainants that the Union Pacific System is competitive with the Burlington System (R. pp. 151, 207)—a fact of legal importance in view of the Nebraska laws concerning the restriction of

competition between parallel railways. The difficulties resulting from this condition complainants have sought to dissipate by suggesting that the Northern Pacific Company does not control, but has only an equal interest with the Great Northern Company in controlling, the Burlington System (R. p. 151). However, for the purpose of preventing or of smothering the Burlington competition, the Union Pacific Company, if substantially in control of the Northern Pacific Company, by exercising its veto power over its co-owner, the Great Northern Company, would be able to effect its unlawful purpose as to the Burlington almost as well as though it were the paramount owner of Burlington stock.

To acquire and to maintain control of the Northern Pacific System, therefore, is the essential, underlying and sleepless purpose of the Union Pacific party. Such control it now seeks by demanding a majority of the present outstanding Northern Pacific stock, though when entering the Securities Company, in November, 1901, the Union Pacific party had no such control. In other words, the Union Pacific party is endeavoring, by means of a decree of this Court, to improve, to strengthen and to extend its influence over the Northern Pacific system.

Even though the Union Pacific party's claim be regarded as though limited to the 717,320 shares of Northern Pacific stock tied up by the injunction (R. p. 350), a little less than a majority of the stock, such minority interest would be effectual for control if the remainder of such stock is dispersed among Northern Securities stockholders according to present interests instead of being accumulated by return to the original depositors. Accordingly and naturally it will be found that from the beginning of this litigation the continually recurring suggestion of the complainants has been and is that the Securities Company forthwith should proceed to make present ratable distribution of all of the Great Northern stock and of all of the Northern Pacific stock except the portion retained for the possible benefit of the complainants, who, in case of a

final decree in their favor, would then be in clear and indisputable control of the long-coveted competing Northern Pacific System and would be invested with a veto power upon the operation of the concededly closely parallel and interlacing lines of the competing Burlington System.

The parallelism and competitive situation of these great railroads is established by this record *(infra*, p. 3), and furthermore is an important, permanent and obvious physical fact of which the Courts will take judicial notice *(Gulf, &c. R. R. vs. State*, 72 Tex., 404, 10 S. W., 81; *Miller vs. Texas, &c. R. R.*, 83 Tex., 518, 18 S. W., 954).

In fine, if, as contended by the complainants, considerations of public policy are to enter into the determination of the present appeal, it would be impossible to devise a scheme more ingenious than that insidiously suggested by the complainants, to defeat and to evade the Circuit Court decree defining and declaring the public policy which should regulate this entire railway situation.

THIRD. The question whether the proposed ratable distribution would be in violation of public policy, or would in any way promote the illegal purpose which it was the design of the Government suit to frustrate, has been decided by the Circuit Court in Minnesota which rendered the original decree in the Government suit, and has been settled, so far as it can be settled, by the executive department of the Government charged with the enforcement of the statute. In the intervention proceeding the Department of Justice has declared in substance that the proposed distribution would have no such effect, and the Circuit Court decided that it would have no such effect. Little weight should be given to the contrary assertion of the complainants here, who were parties to the original illegal purpose, who certainly are not charged with the protection of public policy in this regard, whose motive in making the assertion is to secure a personal advantage, and who sustain their assertion only by suspicion.

FOURTH. The injunction which prevents the distribution of the 710,000 Northern Pacific shares claimed by complainants also prevents *any* distribution of the Northern Securities assets.

The distribution authorized by the Board of Directors and the stockholders, at their meetings in March and April, 1904, was based upon the application of that principle to all the shareholders of the company. The complainants now say, "Exempt us from the application of that principle, take out from the assets of the corporation and give to us what we claim thus giving us the practical control of the Northern Pacific Railway, and then proceed and apply the principle of equal ratable distribution to the other shareholders!"

The other shareholders cannot be expected to assent to any such proposition; they cannot reasonably be required to assent to it. The principle of ratable distribution must apply to all or to none. If Harriman and Pierce are to be exempted from the application of that principle, other shareholders must be at liberty to demand a similar exemption. Until the right of anyone to be exempted from the application of the principle has been determined, the principle cannot be applied at all and no distribution whatever can be made.

Second.

The Securities Company became the owner of the railway shares, and does not hold them as a trustee or as a bailee for the complainants.

FIRST. THE FACTS as to the character of the transfer appear fully in the record, and are beyond possibility of dispute.

The facts have been referred to in our preliminary statement, and are collated in the brief filed by Mr. Johnson and Governor Griggs (see pp). For present purposes it is sufficient to quote from the opinion of the Circuit Court of Appeals (R. pp. 391-392) Judge DALLAS' summary and absolutely accurate recapitulation as follows:

"The appellees averred in their bill, and their counsel have contended in argument, that the shares of railway stock in question were acquired by the Securities Company under and subject to an alleged agreement (which will be presently more particularly referred to) that it would hold them "as custodian, depositary, or trustee"; and that the "legal and equitable owners of said shares of stock of said railway companies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company, or their assigns." On the other hand, the appellant, the Securities Company, insists that it acquired the railway shares referred to by absolute purchase thereof, and that consequently it became and now is vested with the equitable as well as the legal title thereto. The issue thus presented is of primary importance, and the proofs leave us in no doubt as to the facts upon which it must be determined. That the transaction, at least in form, and *prima facie* in substance, was one of purchase and sale is manifest. The resolution which authorized the acquisition of the railway stock on behalf of the Securities Company, was adopted by its Board of Directors at a meeting at which Mr. Harriman was present as a member of the board, and the only authority it conferred was "to purchase said stock . . . at an aggregate price of $91,407,500, payable as to $82,491,871 thereof in the fully paid up and non-assessable shares of the capital

stock of this Company at par, and as to $8,915,629 in cash." It is obvious that this resolution contemplated a "purchase," and not a bailment or trust; and that it accurately stated the nature and terms of the contract which was actually made by and with the Securities Company is unequivocally shown by what was done in pursuance of it. The railway shares were unconditionally assigned to that company; the price specified in the resolution was paid by it, and this payment was made partly in cash and partly in shares of its own stock for which corporate certificates in the ordinary form were delivered and accepted. The cash so paid, which amounted to about $7,522,000 was (as is stated in the bill) "used for the purchase of other property and for corporate purposes"; the complainants received dividends upon the stock that was issued to them, which was paid out of the general funds of the Securities Company; and by its indenture to the Equitable Trust Company of New York, the Oregon Short Line Railroad Company irrefutably asserted its ownership of the Securities Company stock, which it thereby pledged. It is claimed, however, that notwithstanding these facts, the beneficial interest in the railway stock was not transferred to the Securities Company, because, as the appellees allege, the transfer was made under the terms of an agreement which they say was made by James J. Hill, J. Pierpont Morgan, and others, owning or controlling a majority of the capital stock of the Great Northern Railway Company, and a majority of the common stock of the Northern Pacific Railway Company, "to organize a holding company . . . and that said holding company should acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies and control the operations and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company": and that "in pursuance of said agreement said Northern Securities Company was organized . . . and forthwith agreed to acquire and hold the shares of said railway stocks, as aforesaid, as custodian, depositary, or trustee, and to issue in exchange therefor its own share certificates upon said agreed basis." The agreement thus set up is not in accord with the documentary evidence which has been referred to, and to establish its existence a clear preponderance of proof should at least be required,

whereas, in our opinion, it conclusively appears that no such agreement was ever made. Mr. Harriman himself has distinctly testified that the Northern Pacific stock in question was sold; that the transaction was not an exchange; that he, principally, negotiated the sale, and that there was not attached to the negotiations any condition except as to price. And to the same effect is his affidavit in this case, in which he deposed that he was urged by Messrs. Morgan and Company to dispose of the Northern Pacific stock held by the Oregon Short Line Company, and that "they further stated that upon the organization of the proposed holding company" not that it would take as custodian or trustee, but that "they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line and to pay therefor in the stock of the holding company." These statements of that one of the complainants having most knowledge of the subject, confirmed, as they are, by the other evidence, make it quite impossible to believe that the railway stock was received by the Securties Company merely as a custodian or depositary. The only agreement upon which it was transferred was an unqualified agreement of sale."

This summary statement of the learned judge is not disputed by the complainants, who say (Petition, p. 35) that

"The transaction in November, 1901, was undoubt-
"edly put in the *form* of a contract of purchase and
"sale. The facts and surrounding circumstances,
"however, fixed the legal nature and effect of what
"the parties did, and not the particular form they
"adopted, or the words they selected as expressing
"their view or opinion * * * * * * * *
"*Evidently, Mr. Harriman at the time believed as a*
"*matter of law that the transaction constituted a sale,*
"*and so testified.*"

Thus it is conceded even now by the complainants—all of whom, including Mr. Harriman, signed the Petition—that in form and purpose the transaction was a sale and nothing else. But, unwilling that the courts shall be "blinded by mere

"forms or names, and thus prevented from dealing "with the substance and reality of things" and desirous that the Court shall look "through the form and "phrasing of the parties, and deal with the substance "and reality, in seeking to determine the *truth*" (Petition, p. 36), the complainants insist that the truth is not to be found in what the parties did, and intended to do, and that the reality of this particular transaction, is to be sought, for under the strange mask in which complainants counsel seeks to exhibit it. But whatever legal consequences may be imputed to the transaction, in truth and reality, and also in fact and intent, it was a sale *in presenti*.

SECOND. THE LAW does not authorize or require the transfer of the railway shares to be considered anything other than the sale which in fact and intention it was.

We are not now considering questions which we shall hereinafter discuss—whether the sale was upon a condition subsequent, or whether the sale was illegal. What we are now insisting upon is only that IN LAW, as well as in fact, the transaction was not the creation of a bailment or of a trust for the complainants.

What, then, are the grounds upon which—to the contrary of our contention—complainants assert that despite both its form and intent, the transaction was a bailment or a trust for the complainants.

The fundamental ground must be that the transfer was for an illegal purpose. But, as we have already suggested, this would operate merely to invalidate the transfer, and not to change its character. An attempted sale may be a nullity, by reason of illegality; but it does not thereby become a bailment or a trust.

In such case any obligation of the possessor to return property, re ts upon him not because he has become a bailee or a trustee; but as hereafter considered, only in particular cases, because of some necessity of doing justice to a wronged party or when compelled by considerations of public policy, neither of which elements is now present.

THIRD. The ground upon which the complainants most insistently base their claim is the pretense that THE DECREE in the statutory proceeding wherein the Government was petitioner, and the Securities Company, its organizers, and the two railway companies were respondents, adjudicated that the Securities Company was a bailee or a trustee for the complainants in the present suit.

But in that statutory proceeding the complainants were not parties upon the record, nor yet by representation. Upon their theory, at all times as well as now, the particular rights and claims now asserted by them conflicted and could not harmonize with those of any defendant in the Government proceeding, and therefore they could not have been represented by any such defendant.

The rule applicable in such case was accurately stated by Judge HOOK in *Weidenfeld v. Northern Pacific Ry. Co.* (129 Fed. Rep., 305–311) as follows:

"It is true that, generally speaking, a corporation is the proper representative of all its stockholders in a suit in which the relief sought will affect each and all of them in the same way and to the same degree. In one sense all the stockholders are the corporation, and the corporate body, as a legal entity, may be intrusted with the defense of those rights which are common to all. Obviously, the very foundation of this rule is a community of interest, with respect of the object of the suit, between the corporation and all of its stockholders. But, where the gravamen of the complaint consists of a vital conflict of interest between the corporation and one or more of its stockholders, or between different stockholders or classes of stockholders, the reason for the rule concerning the representative character of the corporation ceases."

Neither was the purpose of the Government proceeding to determine the character or the quality of the transfer as between the defendants themselves. As elsewhere we observe, the Circuit Court did not determine any such question. The purpose and the effect of the Government proceeding was limited to

the assertion and enforcement of its constitutional authority to regulate interstate commerce, and of its lawful authority to prevent restraint of such commerce. As afterwards pointed out by Judge THAYER for the Circuit Court in the District of Minnesota (R., p. 367) this assertion and enforcement of the governmental authority was effected by prohibiting certain use of the property and by denying to the Securities Company any benefit from its possession. The decree did not hold directly that the railway stock was unlawfully acquired, but that it was acquired and was held by the Northern Securities Company *in virtue of* an illegal conspiracy. Consequently any acquisition and holding *in virtue of* such conspiracy, were illegal and should be enjoined. Beyond that nothing relevant to any present issue was decreed.

With the transfer of property interests and the effect of such transfers upon the rights of parties, this Court expressly disclaimed any intention to interfere. It conceded the absolute right of individuals to buy and sell what and as they pleased.

The insufficiency of the decree for the purposes of his case was recognized by the skillful draughtsman of the bill of complaint. Accordingly he undertook to stretch the decree, by inserting (p. 9) Article XIII. which alleges *arguendo* that the complainants "are advised by "counsel and *therefore* aver that *the effect* of said de- "cree of April 9, 1903, as affirmed by the Supreme "Court of the United States was to adjudge that the "Northern Securities Company was not a purchaser "or owner, but simply a custodian, of the shares of "stock of said railway companies acquired and held by "it as aforesaid, etc. etc."

Of course the decree of the Circuit Court as affirmed "is conclusive upon any matter directly in "question before it, even when coming incidentally in "question in another court for a different purpose "*between the same parties.*" But to this commanding "rule formulated by him in the *Duchess of Kingston's Case* (20 How. St. Tr. 538, 2 Sm. Ldg. Cases [8th Ed.]

784) Lord Chief Justice DE GREY attached the following exception, now directly in point: "But neither the "judgment of a concurrent or exclusive jurisdiction is "evidence of any matter which came collaterally in "question, though within their jurisdiction, nor of any "matter incidentally cognizable, *nor of any matter to "be inferred by argument from the judgment.*" (See *Hopkins v. Lee*, 6 Wheat. 108.)

"It is a very familiar principle that a judgment concludes the parties only as to the grounds covered by it, and the facts necessary to uphold it. (Cow. and Hill's Notes, vol. 3, p. 826.) And, although a decree in express terms professes to affirm a particular fact, yet, if such fact was immaterial, and the controversy did not turn upon it, the decree will not conclude the parties in reference to that fact. *Coit v. Tracy*, 8 Conn., 268; *Manny v. Harris*, 2 Johns. 224.) The mere fact of the alleged tenancy is undoubtedly found by the judge on the trial in the Superior Court, but the fact was immaterial, and the judgment did not in any respect rest upon that finding, as is most obvious from an inspection of the pleadings, the findings of the court, and the final judgment rendered thereon." *People v. Johnson*, 38 N. Y., 63, 65-66. See also *Stokes v. Foote*, 172 N. Y., 327, 341-342.)

FOURTH. Certain expressions used by Mr. Justice HARLAN, descriptive of the method adopted in carrying out the combination that has been adjudged to be illegal, have been urged as conclusive in favor of complainants upon the question of title. But as already observed the critical question in the Government proceeding concerned not title but combination.

To the established fact of illegal combination, complete title would have contributed no less efficiently than mere custodianship. If, as contended by complainants, a mere custodian of the railway shares possessed the power to restrain commerce, it is clear that the owner of such shares would have had no less power.

The complainants are not suing upon an opinion of the Supreme Court. Nor, strictly speaking, are they suing upon a decree of the Supreme Court. Their suit is based upon the *Circuit Court's* "decree of April "9, 1903, as affirmed by the Supreme Court of the "United States." *(Second Amended Bill of Complaint, Article XIII.*, page 9.)

Upon this particular point, then, the questions are as to the effect of: *(1)* The Circuit Court's Decree of April 9, 1903; *(2)* The Circuit Court's Opinions; *(3)* The Supreme Court's Judgment; and *(4)* The Opinions in the Supreme Court.

1. *The Circuit Court's Decree of April 9, 1903.*

The decree consists of three articles.

The *first article* (described by Judge THAYER as wholly prohibitive) adjudges that the defendants, being the Securities Company, the two Railway Companies and the two groups of stockholders, had theretofore entered into a combination or conspiracy in restraint of trade and commerce, and that all stock of either of the Railway Companies then claimed to be held and owned by the Securities Company was acquired and was then held by it in virtue of such combination or conspiracy in restraint of trade; and it restrains and enjoins the Securities Company and the two Railway Companies from exercising, or permitting the exercise of, any control by the Securities Company over either railway, or any exercise of the voting power of the railway shares, and the payment or reception of dividends upon the railway shares held by the Securities Company. This first article also expressly forbids the Securities Company from acquiring, or attempting to acquire, further stock of either of the Railway Companies.

The *second article*, being the so-called *permissive* article, provides that nothing shall be construed as prohibiting the Securities Company from returning and transferring the railway shares either *(1)* to

the original railway shareholders who had delivered their shares to the Securities Company in exchange for its stock, or *(2)* to such person or persons as may now be the holders and owners of *its own stock* originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies.

The *third article* awards costs.

The effect of the *substantive provisions* of the first article of the decree undoubtedly was to denounce as illegal the combination resulting in and constituted by the Northern Securities Company, and to determine that all of the railway shares in possession of the Securities Company were acquired and are now held in virtue of an illegal combination.

Whether or not the very act of transfer of these shares in virtue of such combination was or was not illegal, was not expressly adjudicated. Even if the necessary effect of the decree was to adjudge the illegality of the transfers, the decree failed either expressly or by implication to pass upon or to determine the rights of the several parties in respect of the shares so transferred. As has since appeared, the absence of any adjudication upon this point was intentional.

The essential provisions of the first article of the decree are the *prohibitive provisions*. As was observed by Judge THAYER in the opinion of April 19, 1904:

"The decree was wholly prohibitory. It enjoined "the doing of certain threatened acts, and so long as "these acts are not done it enforces itself, and no "further action looking to its enforcement is deemed "essential. In its bill of complaint the United States "prayed, among other things, for a mandatory injunc- "tion against the Securities Company requiring it to "recall and cancel the certificates of stock which it "had issued and to surrender the stock of the two "Railway Companies in exchange for which its stock "had been issued. This prayer for relief was denied. "The Court doubted its power to command stock- "holders of the Securities Company, who had not been

" served with process and were not before the Court
" otherwise than by representation (if indeed they were
" present by representation), to surrender stock which
" was in their possession and to take other stock in
" lieu thereof. It accordingly contented itself with an
" order which rendered the stock of the two Railway
" Companies, so long as it was in the hands of the Se-
" curities Company, valueless for the purpose of carry-
" ing out the objects of the unlawful combination in
" restraint of interstate trade. The Government was
" satisfied with the relief which it obtained and ex-
" presses itself as fully satisfied therewith at the
" present time."

The *second* or so-called *permissive* article of the decree also has been fully construed by Judge THAYER in his opinion of April 19, 1904, as follows:

" It is true that the decree contained a provision in
" substance that nothing therein contained should be
" construed as prohibiting the Securities Company
" from returning to the stockholders of the Northern
" Pacific Railway Company and the Great Northern
" Railway Company any and all shares of stock
" in either of said Railway Companies which the
" Northern Securities Company had acquired in ex-
" change for its own stock, and that nothing therein
" contained should be construed as prohibiting the
" Securities Company from making such transfer of
" the stock aforesaid to such person or persons as had
" become the owners of its own stock originally
" issued in exchange for stock in the two Railway
" Companies. But this provision was merely per-
" missive. It did not command that the stock should
" be returned or exclude other methods of disposing
" of it that in view of all the circumstances might
" appear to be more equitable. The fact that the
" directors of the Securities Company have proposed
" to its stockholders a plan of distributing the stock
" of the two Railway Companies in a manner some-
" what different from that which was tentatively sug-
" gested by the decree but not commanded, cannot be
" regarded as a failure to obey the decree. It was
" said in argument that one purpose of the inter-
" vention is to have that clause of the decree which is
" now merely permissive, made mandatory. But this
" would be to modify the provisions of a decree which

" has now become final by affirmance, and make an
" order which we expressly and on full consideration
" declined to make when the decree was entered. This
" we must decline to do."

In this Government proceeding upon a criminal statute, the Circuit Court properly doubted its power to determine or to affect the rights of the stockholders of the Securities Company in the property held by that company. When, at St. Paul, in the Government suit the Circuit Court was asked to make mandatory these permissive clauses, the Court expressly declined so to do, because

" this would be to modify the provisions of the decree
" which has now been made final by affirmance, and
" make an order which we expressly and on full con-
" sideration declined to make when the decree was en-
" tered."

As already observed, Judge THAYER has held that the provision was merely permissive, and that it did not

" command that the stock should be returned, or ex-
" clude other methods of disposing of it that in view
" of all the circumstances might appear to be more
" equitable."

That the *decree* of the Circuit Court was not intended to define the character of the Securities Company's possession, is indicated further by the two *opinions* of the Circuit Court of April 9, 1903, and April 19, 1904.

2. *The Circuit Court's Opinions.*

(a) Judge THAYER's opinion of April 9, 1903, repeatedly recognizes the Securities Company's ownership of the railway stocks, and so states the essential question at issue as to exclude the complainant's present contention that the decree denied the title of the Securities Company.

Upon this point the following statements seem to be conclusive:

"Very shortly after its organization the Securities "Company *acquired* a large majority of all the stock "of the Northern Pacific Company at the rate of $115 "per share, *paying* therefor in its own stock at par. "At the same time it *acquired* about 300,000 shares of "the stock of the Great Northern Company from those "stockholders of that company who had been instru- "mental in organizing the Securities Company, *paying* "therefor at the rate of $180 per share, and using its "own stock at par *to make the purchase.* The Securi- "ties Company subsequently *made further purchases* "of the Great Northern stock at the same rate."

References to the transaction as a purchase are too many to justify repetition. Four particular paragraphs will be sufficient to show that they were not unintentional:

"At the present time" (April, 1903) "the Securities "Company is *the owner* of about ninety-six per cent. of "all the stock of the Northern Pacific Company and "*the owner* of about seventy-six per cent. of all the "stock of the Great Northern Railway Company."

"First, it (the scheme) placed the control of the "two roads in the hands of a single person, to wit, the "Securities Company, *by virtue of its ownership of a* "*large majority of the stock of both companies.*"

(The foregoing holding *in totidem verbis* was adopted by Mr. Justice HARLAN.)

"The fact that *the ownership* of a majority of the "capital stock of a corporation gives one the mastery "and control of the corporation was distinctly recog- "nized and declared in *Pearsall v. Great Northern* "*Railway Company.*"

"In opposition to this view, counsel cite *Pullman* "*Car Co. v. Missouri Pacific Co.;* but in that case the "meaning of the word 'controlled,' as used in a pri- "vate contract, was the point under consideration, "and what was said on the subject cannot be held "applicable to cases arising under the anti-trust act, "when THE POINT INVOLVED IS WHETHER THE OWNERSHIP

" OF ALL THE STOCK *of two competing and parallel roads*
" *vests* THE OWNER THEREOF *with the power to suppress*
" *competition between such roads. We entertain no doubt*
" *that it does. Indeed we regard the suppression of com-*
" *petition, and to that extent a restraint of commerce, as*
" *the natural and inevitable result of* SUCH OWNERSHIP."

This statement that the point involved depended upon the Securities Company's *ownership* of the railway stocks, would seem conclusive that the Circuit Court did not deem it to be essential to deny that such ownership existed.

(b) Judge THAYER's opinion of April 19, 1904, already quoted at length, reinforces our construction of his first opinion.

In the proceeding in which was rendered the later decision of Judge THAYER, the claim of the complainants, seeking to intervene in the Government suit for the purpose of making therein their present contention, was not that of a stockholder within the Securities Company, but was from the outside against that Company, and was in hostility to all claims of its stockholders. As against such an outside claim, any plea of alleged equities of stockholders *inter sese*, was impertinent. But, Judge THAYER recognized the right of the Securities Company to do equity, and to that end to dispose of the railway shares—a right necessarily exclusive of the complainants' claim of their continuing ownership of those shares. He declared that the original decree did not exclude any method of disposing of the stock that in view of all the circumstances might appear to be more equitable, and that a proposition to distribute the railway shares "in a manner somewhat different from " that which was tentatively suggested by the decree, " but not commanded, cannot be regarded as a failure " to obey the decree."

Such language is absolutely inconsistent with the idea that the author of the decree intended to deny the power of the Securities Company to make disposition

of the railway shares among the stockholders of the Securities Company upon the basis of their relative rights as stockholders of that Company.

In our view, therefore, the decree of April 9, 1903, in its own terms, and as construed by the two opinions of Judge THAYER, involves no decision that any original vendor of railway shares was *entitled* to a judicial restitution thereof.

3. *The Supreme Court's judgment.*

" *The judgment of the Court is that the decree below* " *be, and hereby is, affirmed, with liberty to the Circuit* " *Court to proceed in the execution of its decree as the* " *circumstances may require.*"

From this judgment four justices dissented. Therefore, unless the other five justices concurred in reasons different from those stated by the Circuit Court, the decree of the Circuit Court would stand affirmed upon the grounds assigned below. The reasons for affirmance, stated in the opinion of Mr. Justice HARLAN, received the concurrence of three other justices.

In the judgment of affirmance Mr. Justice BREWER concurred, but he stated his own views for himself.

" I cannot assent to all that is said in the opinion " just announced, and believe that the importance of " the case, and the questions involved, justify a brief " statement of *my* views."

4. *The Opinions in the Supreme Court.*

This honorable Court alone can declare, and it needs no advice to enable it to declare, what was the opinion of the Court. It would seem that it has not yet so declared (see remarks of Mr. Justice PECKHAM, *Dorr vs. U. S.*, 195 U. S. 138–154).

It is sufficient now to observe that incidental and illustrative expressions do not partake of the charac-

ter of a judgment. Upon this point, the law was stated, with his accustomed felicity, by Mr. Justice CURTIS in *Carroll vs. Lessee of Carroll* (16 How. 275, 287), as follows:

"This court, and other courts, organized under the "common law, has never held itself down by any part "of an opinion in any case which was not needful to "the ascertainment of the right or title in question "between the parties."

Inasmuch as the Circuit Court made no deliverance as to title or custody either in its opinion or in its decree based thereon and affirmed in this Court, how can it be that the parts of Mr. Justice HARLAN'S opinion cited by complainants, even in the sense attributed by them, were "*needful* to the ascertainment of any right or title in question" between the respective defendants to the Government proceeding?

The true rule is that which in the case of *U. P. Ry.* v. *Mason City &c. R. R.* (128 Fed. Rep. 230, 235-236) was recognized by Judge SANBORN (p. 234) being Chief Justice MARSHALL'S ruling in *Cohens v. Virginia* (6 Wheat. 234, 399), that "It is a maxim not to be dis-"regarded that general expressions in every opinion "are to be taken in connection with the case in which "those expressions are used. If they go beyond the "case they may be respected, but they ought not to "control the judgment in a subsequent suit when the "very point is presented for decision," etc., etc.

We may briefly consider the *particular expressions of Mr. Justice* HARLAN, upon which the complainant have chosen to hang their case.

The first of these expressions is that:

"There was no actual investment, in any substantial "sense, by the Northern Securities Company in the "stock of the two constituent companies. If it was, in "form, such a transaction, it was not, in fact, one of "that kind."

Later Mr. Justice HARLAN observed that the actual nature of the transaction "was only to organize the "Northern Securities Company as a holding company, "in whose hands, not as a *real purchaser* or *absolute* "*owner*, but *simply as a custodian*, were to be placed "the stocks of the constituent companies."

It has been observed that in the Circuit Court the learned Judges did not so much as suggest any such ground either in their opinion or in their decree to which consequently it could not have been deemed essential by them. Nor as we have indicated, were such grounds inherently essential to any judgment rendered by the Circuit Court or by the Supreme Court; for the power of an illegal combination as owner, could not have been less than its power as a mere custodian, of the railway shares.

If, as argued by complainants, mere custodianship by the Securities Company was sufficient to support the judgment of the Court denouncing the combination, then the judgment in the suit of the Government, directed expressly against the power of the combination, did not involve, or depend upon, a determination that the Securities Company was not something more than a custodian of the railway stocks. For the purposes of that suit, it was enough that in any capacity the Securities Company had the power to vote the railway stocks, and to receive the dividends thereon. The real object and effect of the decree was to destroy that power, and was not to define the tenure out of which the power issued.

But Mr. Justice HARLAN'S opinion as to the character in which the Securities Company held the railway shares, is to be ascertained not from this incidental expression—but from his very significant declaration as follows:

"The Circuit Court was undoubtedly right when it "said—all the judges of that court concurring—that "the combination referred to 'led inevitably to the "following results: First, it placed the control of the "two roads in the hands of a single person, to wit, the "Securities Company, by virtue of its *ownership* of a

" large majority of the stock of both companies; sec-
" ond, it destroyed every motive for competition be-
" tween two roads engaged in interstate traffic, which
" were natural competitors for business, by pooling the
" earnings of the two roads for the common benefit of
" the stockholders of both companies.' "

This adoption and affirmance of the holding of the Circuit Court upon the precise point, excludes the idea that in referring to the Securities Company as custodian Mr. Justice HARLAN intended to decide that it was not owner of the railway shares.

The term "*holding corporation*" means merely a *stockholding* corporation, and does not indicate that the corporation does not own the stock which it holds. A stockholder ordinarily is a stock owner.

The term "custodian" even though representative of a combination formed by the shareholders of the constituent companies, *does not necessarily imply a custody of the several shares, for the respective vendors thereof. Naturally it would signify a custody for the whole body of stockholders of the Securities Company* in the usual way in which all corporations hold all their assets in custody for the benefit of all their stockholders, without distinction as to persons or property. All corporations are essentially combinations of stockholders, who alone have any beneficial ownership of the corporate property, as they alone have any capacity to enjoy. In this sense, every corporation is custodian for its stockholders—a sort of pool from which they draw in common. Nowhere in bill, proof, opinion or decree was the acquisition of the Northern Securities Company sought to be distinguished from a stock acquisition by any other corporation in exchange for its stock.

Unless this had been so the Government's bill must have failed. That bill and the decree were based upon the idea that the two separate groups of vendors of railway stock had merged their separate interests in a common interest, so that all motive for competi-

tion was lost. If, notwithstanding the transfers, the original interests continued unaffected, then each group of original vendors must have had a continuing interest in the upbuilding of its own railway as against the other railway, and so the motive for competition would have continued.

The complainants have declared that this point in the opinion of Mr. Justice HARLAN is

" of all points the controlling and decisive consider-
" ation, namely, that the Securities Company was not
" entitled to exercise the rights of ownership because
" it was not in fact an owner but a mere custodian,
" depository or trustee."

Clearly this is erroneous. The Securities Company was forbidden to exercise the ordinary rights of ownership, *not* " because it was *not*, in fact, an owner, but a mere custodian, depository or trustee," but expressly upon the ground that the exercise of its rights, whatever they were, whether those of owner, custodian, depository or trustee, *would tend to prevent competition and thus to restrain commerce.*

It is necessary to consider the whole of Mr. Justice HARLAN'S opinion and not merely one portion of it. Other portions clearly are inconsistent with the idea that Mr. Justice HARLAN intended that in every sense the Securities Company was custodian or trustee of the railway shares for original vendors who retained full rights of property therein. He says :

" In further pusuance of the combination, the Se-
" curities Company acquired additional stock of the
" defendant railway companies, issuing in lieu thereof
" its own stock upon the above basis, and at the time
" of the bringing of this suit *held as owner and propri-*
" *etor substantially all the copital stock* of the Northern
" Pacific Railway Company, and, it is alleged, a con-
" trolling interest in the stock of the Great Northern
" Railway Company, ' and is voting the same and col-
" ' collecting the dividends thereon, and in all respects
" ' is acting as the owner thereof, in the organization,
" ' management and operation of said railway, compa-
" ' nies, and in receipt and control of their earnings.' "
(P. 319).

" In this manner, the interests of individual stock-
" holders in the property and franchises of the two
" independent and competing railway companies were
" to be *converted into an interest in the propety and*
" *franchises* of the holding corporation." (P. 319.)

" The stockholders of these two competing com-
" panies *disappeared*, as such, for the moment, but
" immediately *reappeared as stockholders of the hold-*
" *ing company*, which was thereafter to guard the in-
" terests of both sets of stockholders *as a unit*, and to
" manage, or cause to be managed, both lines of rail-
" road as if held *in one ownership*. Necessarily by
" this combination or arrangement the holding com-
" pany in the fullest sense dominates the situation in
" the interest *of those who were stockholders of the con-*
" *stituent companies; as much so for every practical*
" *purpose, as if it had been itself a railroad corporation*
" *which had built, owned and operated both lines for the*
" *exclusive benefit of its stockholders.*" (P. 323.)

" The result of the combination is that all the earn-
" ings of the constituent companies make *a common*
" *fund* in the hands of the Northern Securities Com-
" pany to be distributed, not upon the basis of the
" earnings of the respective constituent companies,
" each acting exclusively in its own interests, but *upon*
" *the basis of the certificates of stock issued by the hold-*
" *ing company.*" (P. 324.)

" The Circuit Court was undoubtedly right when it
" said—all the Judges of that Court concurring—that
" the combination referred to 'led inevitably to the
" following results: First, it placed the control of the
" two roads in the hands of a single person, to wit,
" the Securities Company, by *virtue of its ownership*
" *of a large majority of the stock* of both companies."
(P. 325).

" It (the Government) does not contend that Congress
" may control the mere acquisition or the mere own-
" ership of stock. * * * But it does contend that
" Congress may protect the freedom of interstate com-
" merce by any means that are appropriate," &c. (P.
331).

" *However that company may have acquired* for itself
" any stock in the Great Northern and Northern Pa-
" cific Railway Companies, no matter how it obtained

" the means to do so, *all the stock it held or acquired* " in the constituent companies *was acquired and held* " to be used in suppressing competition between those " companies." (P. 350).

" By the decree in the Circuit Court it was found " and adjudged * * * that all of the stocks of the " Northern Pacific Railway Company and all the stock " of the Great Northern Railway Company, *claimed to* " *be owned* and held by the Northern Securities Com- " pany, *was acquired*, and *is by it held*, in virtue of " such combination or conspiracy, in restraint of trade " and commerce among the several States." (P. 351).

At page 353 he quotes with approval the language of the Circuit Court :

" Concerning the second contention we observe that " it would be a novel, not to say absurd, interpreta- " tion of the Anti-Trust Act to hold that after an un- " lawful combination is formed and *has acquired the* " *power which it had no right to acquire*, namely to re- " strain commerce by suppressing competition * * * " it must be left in possession of the power it has ac- " quired, with full freedom to exercise it."

All of these many expressions are inconsistent with the denial of ownership by the Securities Company. Among inconsistent expressions, which is to be selected as the one defining the grounds of the judgment, that merely affirmed the decree of the Circuit Court ?

To avoid the necessity of so seeking and nicely valuing the various expressions used by a judge in his opinion, the Courts have laid down the rule already above quoted from the case of *Carroll's Lessee*, that any expression may be disregarded " which was not " needful to the ascertainment of the right or title in " question between the parties."

The complainants' contention as to the effect of the several decrees and opinions, is exhaustively considered and conclusively refuted in the opinion of Judge DALLAS (R. 393–396), and we conclude our argument on this point by a reference to his cogent reasoning.

Therefore we respectfully submit that neither in the nature of the case, nor in any decision of any court, is there anything to impress upon the complainants' transfer of the railway shares any character other than that determined by its form, and by the acts and intent of the parties, which was to effect a sale *in presenti* and was not to create a bailment or a trust for the complainants.

Third.

Complainants' sale of the railway shares was unconditional, and was fully executed upon their contemporaneous receipt of the entire consideration for which they had bargained.

FIRST. The issue on this point was sharply presented, and decisively considered, in the Circuit Court of Appeals (see Opinion, R. pp. 392-3). Judge DALLAS sums the matter up as follows:

"The only agreement upon which it [the railway stock] was transferred was an unqualified agreement of sale, and the fact that the design with which the Securities Company was organized has been compulsorily abandoned has not divested or in any way affected the absolute title which by executed contract of purchase it acquired. * * * The only consideration agreed upon was payment of the price, and, admittedly, that payment was made."

SECOND. This finding clearly was justified by the evidence. In their petition for the writ of *certiorari* (p. 38), the complainants say:

"*It is true that Mr. Harriman also testified in the evidence before this Court in the Government suit that the transaction was an unconditional purchase and sale,* but this was only his opinion and understanding on a question of law and was not at all in conflict or inconsistent with his now stating the facts and letting the courts determine the legal effect. Is it not elementary law that the assertion of a *legal conclusion* under such circumstances never operates to estop a party from showing the real facts?"

The testimony of Mr. Harriman thus referred to may be found in the record at pages 199, 200, 202, 205, 206, 207, 208, 209, 210, 213, 214, 215, 226, 234, 235, 237, 238 and 239. If it is to be understood that in his answers to the searching questions of the Interstate Commerce Commission and of the Attorney General of Minnesota, Mr. Harriman was stating not "the real facts," but "only his opinion and understanding on a ques-

tion of law," it would hardly seem that any useful purpose could be served by postponing decision of the question before the Court in order to elicit from Mr. Harriman additional opinions and understandings on questions of law. But the testimony of Mr. Harriman consists of concrete statements as to what was, and what was not, said and done in conference between him and J. P. Morgan & Co. These statements purely of fact are confirmed by the other evidence and documents in the case (R. p. 163–5, 168–170, 177, 242, 271). Of course, the legal effect to be attributed to such facts is a subject for judicial determination ; but, surely, no basis of determination could be more satisfactory than that afforded to the Circuit Court of Appeals by the testimony by the principal complainant given before securing professional advice as to what is necessary to constitute a statement of " real fact."

Do the complainants' counsel really contend that the testimony of Mr. Harriman—of whch the following is a fair sample—was not a statement of " real facts " ?

" MR. DAY : Did you attach to your negotiation for the sale of Northern Pacific stock any other condition than the one of the money price ?

" MR. HARRIMAN : No, sir.

" MR. DAY : No other conditions ?

" MR. HARRIMAN : No other conditions that I remember " (R. p. 208). * * *

" MR. HARRIMAN : The transaction was completed." (R. p. 210).

THIRD. As pointed out by Judge DALLAS (R. p. 391) the contract and its terms are conclusively established by the resolutions authorizing the purchases, as adopted by the board of directors of the Securities Company upon November 18, 1901, which resolutions at the succeeding meeting were approved by the vote of Harriman as a member of the board. In his affidavit embodying these resolutions (R. p. 271), Mr. Hill swears that the Securities Company made the purchase upon the terms of these resolutions, and that no other contract was made or authorized, and there is no evidence to the contrary.

FOURTH. The consideration received by the complainants consisted of money and of Northern Securities stock certificates in the common form, fully set forth in the opinion of Judge DALLAS (R. p. 388).

Every one of the certificates, of which there have been issued 86,945 (R. p. 266) declared upon its face that it was one out of the many thousands issuable for the four million shares, and informed each taker that to every taker each certificate would be a muniment of the holder's title to a proportionate interest in the corporate estate vested as a unit in the corporation, but equitably belonging to the holder of its stock (see 17 N. Y. 608). The complainants' acceptance of a consideration in this form conclusively estopped them from disputing that title and ownership had passed from them to the corporation.

The Securities Company was a corporation organized under the laws of New Jersey, with powers as broad as conceded by the liberal laws of that State.

The certificate of incorporation is set forth as Exhibit A to the bill of complaint (R. p. 15) and a statement of its objects is transcribed by Judge DALLAS (R., p. 387).

Under the provisions of the Corporation Act of New Jersey, as well as by the certificate of incorporation, the Northern Securities Company has express power not only to acquire and to hold, but at any time to sell, the shares of the capital stock of any other corporation or corporations. Under §§ 1 and 31 of that Act, it has absolute power also, in the arbitrary discretion of its directors and of the holders of two-thirds of its capital stock, at any time, upon a few weeks notice, voluntarily to dissolve and to wind up the corporation and to distribute its assets. This power might be exercised even for the very purpose of destroying a contract considered to be onerous. (*Windmuller v. Standard Distilling Co.*, 114 Fed. Rep. 491; also 115 Fed. Rep. 749). When in exchange for their Northern Pacific stock, the complainants accepted 824,918 Northern Securities

shares out of a total of 4,000,000 shares, they subjected themselves immediately to this absolute power of dissolution. Certainly the Northern Pacific stock in its treasury was subject to the claims of any creditors of the Securities Company (*Pittsburg Co. v. McMillen*, App. pp. 133-137).

The complainants' unqualified transfer of their railway stock to a company possessed of these powers, and which, immediately upon receipt of the stock, had an absolute right to sell it, either in ordinary course or in liquidation, is inconsistent with the implication of any obligation of the Securities Company to retain the railway shares for any period whatever.

In their brief of January 23, 1905, the complainants' counsel state (p. 66) that:

"The undertaking and promise of the Securities "ties Company which embodied the real purpose of "the whole transaction were to hold the shares in one "ownership for the future and thereby control the "management of the two railway companies. *This "was clearly implied although not declared from the "housetops.*

"The testimony of the promoters quoted in the pe- "tition filed herewith leaves no doubt as to this."

Reference to such testimony will show that which is shown by all the evidence, viz., *first*, that no promise of continuance or of permanent holding was exacted by, or was made to, the complainants; and *second*, that whatever may have been the expectation of any promotor or of any other person, no statement of any such expectation was ever made to the complainants or to any of them, and *third*, that there was no obligation assumed by the Northern Securities Company to the complainants or to any one in respect of its use or holdings of the Northern Pacific stock other than the obligation resulting from the issue of its stock certificates, which with all the incidents attached thereto by the laws of New Jersey constituted the sole subsisting contract, after November 19, 1901, between the Securities Company and the complainants. The con-

dition is properly stated as follows, in the opinion of Judge DALLAS (R. p. 393):

"Undoubtedly, it was anticipated by the complainants, as by all concerned, that the rights ordinarily incident to the ownership of stock, including the right to vote and to receive dividends, would be exercisable as to this stock by the Securities Company. But *expectation is not contract*, and therefore the frustation of this anticipation cannot be said to have occasioned a failure of consideration."

When Harriman and Pierce accepted stock of the Securities Company in part payment for the railway shares by them sold and delivered, they acquired a right to receive dividends, when and as declared, not in perpetuity, but only during the continuance of the corporation. Their right to periodical dividends of surplus earnings was not greater or different than that of one acquiring stock in any corporation.

Generally speaking, the rights by them intended to be acquired, and which actually were acquired, were the ordinary rights of the taker of stock in any business corporation of New Jersey, including the right to receive periodical dividends when and as declared, and to share in the distribution of the capital upon final dissolution—the power of the corporation finallyto dissolve itself, at any time, not being limited either by any agreement or by the inherent nature of the transaction.

FIFTH. As was accurately observed by Judge DALLAS (R. p. 392), "by its indenture to the Equitable Trust Company of New York, the Oregon Short Line Railroad Company irrefutably asserted its ownership of the Securities Company stock, which it thereby pledged."

This particular finding is criticised in the Petition (p. 39) as an erroneous assumption, on the ground that "obviously the Oregon Short Line Company became "the holder and owner of the certificates the same as "if they had been mere receipts, which it could

" pledge, transfer and assign without in any way affect-
" ing or changing the contract which those certificates
" or receipts might evidence ".

But, this criticism of the opinion of the Court below cannot receive acceptance, for it disregards the fact that a pledge of the stock certificates in ordinary form, being an unqualified declaration of the corporate ownership in the corporate assets, involves the pledgor's assertion to all the world that the corporation is the owner of the assets which appear to belong to it. On the other hand the pledge of a mere receipt or trust certificate would put every pledgee upon inquiry as to the conditions of the trust or deposit, and might not be inconsistent with the pledgor's denial of an absolute ownership by the corporation.

This observation applies with especial force to a transaction in which the pledge of the stock certificates was as security for negotiable bonds, which were to be and were sold, to the extent of $82,000,000, sold to the public, who necessarily must rely upon the representations expressed and implied in the instrument of pledge, and to whom that instrument assured not merely the payment of principal and interest secured by the pledge of the stock certificates, but also a participation in all dividends that should be paid upon the pledged stock. Granting, that if the complainants had had trust receipts or voting trust certificates, they might have pledged them, nevertheless it was certificates of stock that they pledged under the conditions above set forth.

Sixth. The complainants are conclusively estopped from asserting here that the contract between them and the Northern Securities Company contained any stipulation or promise as to the holding of the Northern Pacific stock by the Securities Company, or the use which that company would make of it, or that there was any agreement between them and the Northern Securities Company which went beyond the fully executed transaction appearing in the written instruments

passing between the parties. They cannot now say that there was any such further agreement without convicting themselves of being parties to an attempted fraud upon this court.

The answer of the Securities Company in the Government suit avers :

" Every share of the Great Northern Company and " the Northern Pacific Company acquired by this de- " fendant has been, and so long as it remains the " property of this defendant will continue to be, held " and owned by it in its own right, and not under any " agreement, promise or understanding on its part or " on the part of its stockholders and officers, that " the same shall be held, owned or kept by it for " any period of time whatever, or under any agreement " that in any manner restricts or controls to any ex- " tent any use of the same which might lawfully be " exercised by any other owner of said stocks. There " has been and is no agreement, promise or under- " standing between any of the holders of said stocks so " acquired by this defendant, or between any of them " and any other person or corporation, that any of said " shares should at any time be held, used or voted by " this defendant for the purpose of combining, or con- " solidating, or placing under one common management " or control, the railways of the Great Northern Com- " pany and of the Northern Pacific Company, or the " business thereof, or for the purpose of monopolizing " or restraining traffic or competition between the said " railways " (R. p. 91).

The complainant Harriman—the record owner of the Northern Pacific stock, the transfer of which is now in question—was a director of the Northern Securities Company and a member of its executive committee at the time this answer was interposed.

The complainants, in their *second amended bill of complaint* herein, aver " that they were represented in said suit by the Northern Securities Company " (R. p. 8).

In their second amended bill, in their petition for a writ of *certiorari*, and in their brief filed in this court January 23, 1905, the complainants answer the charge

of *laches* by averring that they refrained from taking any steps, or instituting any proceedings, for the protection of their rights asserted herein, to await the determination of the Government suit—that is to say, of the suit in which the contract between them and the Northern Securities Company was stated by that company in the averment above quoted (R. p. 5; Petition for *certiorari* p. 41; brief of January 23, 1905, p. 63).

In their brief, filed January 23d, they say:

"The fact that the petitioners, complainants below, "refrained from filing a bill until after affirmance of "the decree in the Government suit, does not charge "them with laches. The question of law was doubt- "ful and in litigation. They were justified in waiting "until the final adjudication. Good faith required "this. If the contract was valid and legal, which they "believed, as is conceded, they would necessarily have "to abide by the contract and permit the Securities "Company to continue to hold the Northern Pacific "stock and distribute the dividends."

The contract presented to the court as the basis for determining that question of law, was the contract described in the allegations above quoted.

Upon the trial of the Government suit, the testimony of the Complainant Harriman given by him as a witness in the suit of *Minnesota v. Northern Securities Co.* (R. p. 233) fully and at large supported under oath the averment of the answer above quoted.

Having thus sought a judgment of this court upon the legality of a contract alleged and sworn to be only what appeared in the written instruments, and being defeated, the complainants are now seeking a judgment against their associates upon the averment of a wholly different and inconsistent contract.

SEVENTH. The averment that the parties to the formation of the Northern Securities Company believed the transfers of Northern Pacific and Great Northern stock to that Company to be lawful, is wholly incon-

sistent with the statement now made by the complainants as to the terms of that contract. No one for one moment can contend that in November, 1901, there was the slightest question as to whether a contract such as now is averred by the complainants to have been made would be illegal under the Sherman anti-trust act. The agreement which now they pretend to have been made—that the Northern Securities Company was to take this stock, hold it permanently, vote it for the purpose of controlling the two railway corporations, and of collecting and distributing dividends—was precisely the kind of confederation that over and over again the courts had held to be illegal. Upon that point no lawyer and no business man of intelligence in the United States, could possibly have had a moment's doubt.

What *was* doubtful was whether there was any illegality in the unconditional transfer of stock to a corporation lawfully existing under State laws, without any contract other than the contract of incorporation—without any obligation on the part of the new holder of the stock, except the obligation that arose from the contract of incorporation. The whole scheme of the Northern Securities Company was to secure the protection that was supposed to be furnished by a simple transfer to a State corporation, without any agreement or any obligation except the obligations imposed on the corporation by the laws of the State. That was the position which all the parties to the formation of that corporation intended to maintain, and to maintain which they carefully shaped all their proceedings.

The complainants now pretend that, in carrying out this scheme, the parties intended to do the very thing the avoidance of which was a necessary element of the plan. The thing which the parties believed to be legal was the unconditional transfer of the railway shares to the Northern Securities Company, free from agreement or limitation, and that is the only thing which was done by them.

In the final analysis the transaction will be found to be as follows :

There were three separate acts :

1. A combination to restrain trade, &c., by certain means.

2. The formation of a corporation as a means to effect the illegal object.

3. A series of purchases of stock by the corporation as means to effect the illegal object.

The combination was to produce a continuous effect through the natural operation of motives of self-interest in the corporation holding the shares purchased.

But each of any number of separate acts done for the purpose of giving effect to the illegal combination may have been complete.

The corporation was completely formed.

The stock purchases were completely executed.

NINTH. It results that, if the transaction be tested by a consideration either of its inherent character, or of the actions and the intent of all the parties thereto, there is no ground whatever for the assertion that the contract of sale was conditional or that it was not fully executed. In our view this is decisive of the case. Neither is there ground for the claim that a failure to carry out the illegal purpose of the contract would entitle complainants to recover property delivered thereunder.

Even though the contract were deemed to have been executory, it would be executory solely as to its continuing purpose. As alleged, such purpose was to continue to do something now finally enjoined. In such case, the effect of the Court's decree would be to execute the contract by rendering impossible any executory results, and by concluding the term of the contract (*Jones* v. *Judd*, 4 N. Y. 411 ; *Heine* v. *Meyer*, 61 N. Y. 171 ; *Lorillard* v. *Clyde*, 142 N. Y. 456-462).

Fourth.

The Securities Company has not repudiated or abandoned any contract with the complainants.

The only pretense of such a repudiation is to be found in complainants' assertion, that the proposed reduction and disposition of capital stock by the Securities Company constitutes an abandonment of the illegal combination and holding, and of a continuing purpose for which it is alleged that the stock was transferred.

It is not denied, but, as already seen, it is expressly conceded, that the contract for the sale and delivery of the railway shares was fully executed on both sides; and that for more than two years the complainants have enjoyed and exercised the full rights of ownership of the consideration by them received upon such sale. This, as we have already shown, constituted an execution of the contract, and even an accomplishment of the alleged purpose to such an extent as to defeat the complainants now seeking to rescind. But, the assertion of an abandonment or repudiation raises the question, not of law but of fact, whether there was any contract or agreement that the Securities Company should hold these railway shares for any period whatever.

This question we have already answered at length, and have shown the incontestible fact to be that the transfer was made intentionally as an absolute and unconditional sale. Whether or not there was an unexpressed and illegal purpose of the transfer, there was, in fact, no agreement that the railway shares should continue to be held for such or for any purpose. The Securities Company did not, in fact, agree that even for a single day, it would continue to maintain its corporate existence: and no such agreement or purpose can be imputed to the Securities Company from anything inherent in the nature of the transaction. "There is no opportunity to spell out or

" imply a covenant * * * * to continue the busi-
" ness * * * * or which denied to them the right
" at their pleasure to discontinue " (*Jugla vs. Trouttet*, 120 N. Y., 21-28).

In the absence of any agreement limiting the right of the Securities Company to exercise its plenary power in its absolute discretion at any time to sell the shares, or to terminate its corporate existence, its acceptance of the railway shares was for its general corporate purposes, and they became subject to its disposition in the exercise of any of its corporate powers. To all such powers, and to their exercise, Harriman and Pierce consented when they delivered these railway shares, in consideration of the Securities' stock received and retained by them.

Harriman and Pierce accepted stock in the Securities Company—that is, the property interest of a shareholder therein. They are not being deprived of their rights as such stockholders. The legal dissolution of the corporation (or any other proceeding under the Corporation Law), is in accord with the agreement and is not a violation or a repudiation of it.

The only "abandonment" upon which could be implied a promise to return, would be a repudiation which should wholly deny to the party complaining *that which it was agreed he should receive* and which he agreed to accept.

This point is entirely independent of any question as to title, or as to the character in which the Securities Company held the railway shares. Whatever the contract; whatever the purpose of the transfer of those shares; and whatever the legal quality of that contract or that purpose, the question of abandonment or repudiation, as before observed, is a question not of law, but of fact. Here the fact is that there was no agreement and no stipulated purpose which has been either repudiated or abandoned, or which will be violated by the proposed distribution in obedience to the law.

The complainants assert that the Securities Company's proposed compliance with the law as now determined, constitutes an abandonment or repudiation and gives to the complainants a right that otherwise they would not possess. The bare assertion in itself seems to be a travesty upon justice.

"It would be absurd for the law to punish a man for "not doing, or in other words to require him to do, "that which it forbids his doing." 2 Parsons on Contracts, 674.

The expectation of the parties as to the continued profitable holding by the corporation in which they became stockholders, of the railway shares which it acquired, has been frustrated by operation of law, and even if there had been a contract that such an expectation should be fulfilled, there could have been no repudiation charged because of this enforced cessation. (See *People v. Globe Ins. Co.* 91 N. Y. 174.)

Fifth.

The contract of sale of the railway shares having been completely executed, the complainants cannot rescind, even though, as is not the fact, the purposes of the combination may not have been executed.

First. That neither party to an illegal contract, after the same has become fully executed, can recover property delivered thereunder, is a familiar rule of law, fully established, and fully recognized by the learned counsel for the complainants.

Second. That, in at least one aspect, the contract in the present case had been fully executed, is conceded by the complainants' counsel in their brief filed in this Court January 23, 1905 (p. 65), as follows:

"If the transaction between the Northern Securi-
"ties Company and its original depositors consisted
"only of the transfer and delivery of the shares as a
"mere investment under an unqualified contract of
"purchase and sale, it was complete and executed the
"moment the exchange was made, *and if that were all*
"*that either party contemplated* the contract would
"have been a valid contract and would have been fully
"executed."

The point in contest, then, rests *(1)* upon a distinction between the contract and the purposes of the contract, and *(2)* upon the allegation that the purposes of the combination were illegal and were not fully executed. This point we believe has been met and turned. We proceed now to refer to two decisions which absolutely negative the contention that if the illegal purposes of the combination have not been fully accomplished, any party may rescind and may recover his property.

The first is the *Vandalia* case (145 U. S. 393; *Appendix*, 265) hereafter considered, which concerned a lease for the considerable term of 999 years. The purpose of that contract was to convey the railroad and franchise

of the plaintiff to the defendant for all of that term Undeniably the contract " was beyond the defendant's " corporate powers, and therefore unlawful and void, " of which the plaintiff was bound to take notice."

Within seventeen years after the date of the contract, and 982 years before its purpose had been fully accomplished, the plaintiff brought suit to recover back its property because of the invalidity of its conveyance.

There, as here, it was sought to recover, under the *Thomas* case, on the ground that the contract had not been fully executed, and that it was a continuing contract capable of full execution only by observance of its covenants for the prescribed term of 999 years. In other words, the case was of the kind to which the complainants have declared the present case to be analogous. But the contention was rejected, in behalf of the Court, by Mr. Justice GRAY, in the following language :

" *The contract has been fully executed on the part of* " *the plaintiff by the actual transfer of its railroad and* " *franchise to the defendant; and the defendant has* " *held the property, and paid the stipulated considera-* " *tion from time to time, for seventeen years, and has* " *taken no steps to rescind or repudiate the contract.*

" Upon this state of facts, for the reasons above " stated, the plaintiff, considered as a party to the un- " lawful contract, has no right to invoke the assistance " of a court of equity to set it aside. And so far as " the plaintiff can be considered as representing the " stockholders, and seeking to protect their interests, " it and they were barred by laches."

In their brief of January 23, complainants seek to exempt themselves from the application of this decision upon the particular ground that there the complainant was the repudiator of the *ultra vires* contract. But, as we have already shown in this case, the complainants are, and the defendants are not, repudiators

The second case to which we have alluded as subversive of the complainants' contention as to the law, is that of *Kearley v. Thomson* (1890: L. R. 24 Q. B. D. 742).

In this ruling case Mr. Justice FRY, with the concurrence of the Lord Chief Justice COLERIDGE, and the Master of the Rolls Lord ESHER (who had decided *Herman v. Jeuchner)*, presented and disposed of the question as follows:

"Can it be contended that, if the illegal contract has "been partly carried into effect, and partly remains "unperformed, the money can still be recovered? In "my judgment, it cannot be so contended with suc- "cess. Let me put an illustration of the doctrine "contended for, which was that partial performance "did not prevent the recovery of the money. Suppose "a payment of 100 *l.* by A to B on a contract that the "latter shall murder C and D. He has murdered C, "but not D. Can the money be recovered back? In "my opinion it cannot be. I think that case illustrates "and determines the present one.

"I hold, therefore, that where there has been a par- "tial carrying into effect of an illegal purpose in a "substantial manner, it is impossible, though there "remains something not performed, that the money "paid under that illegal contract can be recovered "back."

The rule of law undoubtedly is as stated by these two controlling authorities, and unqualifiedly it negatives the complainants' contention that they are entitled to recover as if upon an unexecuted contract, notwithstanding their reception of the full consideration of the contract, and their participation in and enjoyment of its operation during a period of nearly three years.

Sixth.

The transaction in question being considered in the light of all the facts, either in connection with, or independently of the decree in the government suit, the complainants have no cause of action for the return of the Northern Pacific shares by them delivered to the Securities Company under the contract of November 18, 1901.

FIRST. The claim for rescission and return, so far as based strictly on the decree of April 9, 1903, has been already considered.

Rescission and return cannot be claimed on the ground of fraud or misrepresentation or suppression, as to the organization or powers or purposes of the Northern Securities Company, for the bill lacks the necessary parties and the necessary averments. It is not alleged that either of the defendant corporations made or authorized any representations or any action in the premises. It is not alleged that any false representation was made or that any fact was suppressed. It is not alleged that the complainants or any of them believed or relied upon, or were induced to act by, any representation of any one, whether true or false. There is here no cause of action for rescission for fraud.

Neither can a total failure of consideration be urged Even if illegal, the consideration actually received by Harriman and Pierce was and is immensely valuable.

SECOND. *The only possible ground upon which the prayer for rescission or return can rest, is the illegality of the contract or transaction of November 18, 1901.*

If that contract was legal, of course there can be no rescission.

The bill contains no direct charge of illegality, but this is so only because of complainants' natural desire to escape the dilemma in which they would be placed by a direct allegation of illegality.

The suit, then, is one for rescission and return on the ground of a decree ascertaining and determining the illegality of the transaction. But, as already observed in this case, the former judgment does not cover or embrace all of the questions properly to be considered in a suit for rescission and return. Complainants cannot, merely by indirection in alleging illegality, avoid the inquiries whether they are *in pari delicto*, and whether in equity they are entitled to relief such as they ask.

That they are *in pari delicto;* that they are subject to the rule applicable in such condition; and that in equity they are not entitled to the relief which they ask, are not merely matters for argument, but they are all susceptible of demonstration upon an examination of the facts in connection with the decree and the grounds thereof. Upon all these considerations, it is clear that any adjudication of the illegality of the Securities Company's acquisition of stock of Harriman and Pierce, does not relieve them from the application of the general rule that *in pari delicto potior est conditio possidentis* (*supra*, pp. 9–18).

We now proceed *first* to a presentation of the state of the law concerning illegal contracts and the relative rights of the parties thereto; and *then* to an exhibition of the position of the complainants with reference to such existing rule of law.

THIRD. The Federal decisions, from *Bank v. Owens* in 2nd Peters, to *Equitable v. Wetherill* (February, 1904) in 127th Federal Reporter, have declared one and the same rule, namely, that the Courts will show no favor to either one of two equally guilty parties to an illegal contract, "except to avoid injustice in cases *where injustice may be avoided without weakening the general rule.*" A further exception in protection of public policy, has no place in the present case, from which that element has been withdrawn by the action of the Government and the decisions in the Government suit.

In *Higgins v. McCrea* (116 U. S. 671), the plaintiff, a commission broker, sued for the balance of moneys paid for account of defendant upon the settlement in August, 1883, of certain contracts made in May for the future delivery of produce. The answer in effect averred that the transactions were gambling transactions; that the contracts made for defendant had been cancelled by plaintiff shortly after the making thereof, and that the settlement in August was not of defendant's transactions; and by way of counterclaim the defendant prayed to recover the moneys "paid by him to the plaintiff to promote and carry on said gambling transactions." Upon the evidence, the court found that the contracts *had* been cancelled by plaintiff almost immediately after the making thereof, and this left the defendant, upon the face of his counterclaim, in the position of having paid money to the plaintiff to be used to carry on illegal and criminal gambling transactions (but presumably not used in any such transaction), which money he sought to recover back. Upon the cause of action thus presented by the counterclaim, Mr. Justice WOODS, delivering the opinion of the Court, said: "*We do not* "*see on what ground a party, who says in his pleading* "*that the money which he seeks to recover was paid out* "*for the accomplishment of a purpose made an offence* "*by the law, and who testifies and insists to the end of* "*his suit that the contract on which he advanced his* "*money was illegal, criminal, and void, can recover it* "*back in a court whose duty it is to give effect to the law* "*which the party admits he intended to violate.*"

The general rule as stated by Mr. Justice GRAY for the Court (in *St. L. V. & T. H. R. R.* v. *T. H. & I. R. R.*, 145 U. S. 393-407; *Appendix* p. 265) is that:

"In equity as at law, '*In pari delicto potior est con-*
"*ditio defendantis*'; and therefore neither party to an
"illegal contract will be aided by the court, either to
"enforce it or to set it aside. If the contract is illegal,
"affirmative relief against it will not be granted, at
"law or in equity, unless the contract remains executory,
"or unless the parties are considered not in equal
"fault, as where the law violated is intended for the
"coercion of one party and the protection of the other
"or where there has been fraud or oppression on the
"part of the defendant. *Thomas v. Richmond*, 12
"Wall. 349, 355; *Spring Co. v. Knowlton*, 103 U. S.
"49." (See *Appendix p. 256).*

" While an unlawful contract, the parties to which " are *in pari delicto*, remains executory, its invalidity " is a defense in a court of law; and a court of equity " will order its cancellation only as an equitable mode " of making that defense effectual, and when necessary " for that purpose. Adams Eq. 175. * * *

" When the parties are *in pari delicto*, and the contract has been fully executed on the part of the " plaintiff, by the conveyance of property or by the " payment of money, and has not been repudiated by " the defendant, it is now equally well settled that " neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. *Thomas v. Richmond*, above cited; *Ayerst v. Jenkins*, L. R. 16 " Eq. 275, 284. For instance, property conveyed pursuant to a contract made in consideration of the " compounding of a crime and the stifling of a criminal " prosecution, and therefore clearly illegal, cannot be " recovered back at law, nor the conveyance set aside " in equity, unless obtained by such fraud or oppression on the part of the grantee that the conveyance " cannot be considered the voluntary act of the " grantor." (Citing cases including *Worcester v. Eaton*, 11 Mass. 368, *Appendix p. 68).*

The rule thus accurately and elaborately stated in the cited opinion, is laid down and illustrated by many text writers, with citations of many authorities. See Addison on Contracts, p. 1171, *Appendix p. 374;* Pollock's Principles of Contracts (4 ed.) p. *253, *et seq.*, *Appendix p. 364;* 1 Story Eq. Juris. (13 ed.), § 298, pp. 301–303, *Appendix p. 371;* 2 Pomeroy Eq. Juris. (2 ed.) § 939–942, pp. 1349–1359, *Appendix p. 367;* Story on Sales p. 603, *Appendix p. 373.*

The two cases of the *Central Transportation Co.* and the *Pullman Co.* (139 U. S. 24, *Appendix* p. 279; 171 U. S. 138, *Appendix* p. 307) arose out of a contract or lease which

" was held to be void because it was beyond the " powers conferred upon the Central Company " by the legislature and because it involved an " abandonment by that company of its duty to the " public. It was also added by Justice GRAY, " that there was strong ground also for holding that

" the contract between the parties was void because in " unreasonable restraint of trade and therefore con- " trary to public policy." (By Justice PECKHAM: see *Appendix* p. 314).

Each of these cases deal with a transaction held to be illegal because *ultra vires* the Central Company. The reasons for allowing a recovery of property illegally transferred were, therefore, much stronger than is possible in a case such as this, where the illegality consists in the commission of a criminal offense. On the other hand, the conclusions deliberately announced by this Court as to the limitations upon such a right of recovery, and the circumstances which will be fatal to the allowance of recovery, if applying to a case of simple *ultra vires*, apply with still greater force in the case at bar.

In the first, or *Central* case (139 U. S. 24; *Appendix* p. 279), Mr. Justice GRAY, dwelling upon the *ultra vires* contract, used the following language:

" A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as it could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.

" In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.

" The ground and the limits of the rule concerning the remedy, in the case of a contract *ultra vires*, which has been properly performed, and under which property has passed, can hardly be summed up better than they were by Mr. Justice MILLER in a passage already quoted, where he said that the rule 'stands upon the broad ground that the contract itself is void, and that

nothing which has been done under it, nor the action of the court, can infuse any vitality into it;' and that 'where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands.' *Pennsylvania Railroad* v. *St. Louis &c. Railroad*, 118 U. S. 317.

"Whether this plaintiff could maintain any action against this defendant, in the nature of a *quantum meruit*, or otherwise, independently of the contract, need not be considered, because it is not presented by this record and has not been argued. This action, according to the declaration and the evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant is not liable for."

When using this language, Mr. Justice GRAY had in mind those contracts that were merely *ultra vires*, but not those that were clearly illegal because expressly prohibited, as is evident upon reference to his opinion above quoted in the *Vandalia* case (145 U. S. 393, *Appendix p. 265*), as well as to his opinion in *Cranson v. Goss* (107 Mass. 439; *Appendix pp.* 92, 94), where he said:

"If a chattel has been sold and delivered on the Lord's day without payment of the price, *the seller cannot recover either the price or the value; not the price agreed on that day, because the agreement is illegal; not the value, because, whether the property is deemed to have passed to the defendant, or to be held by him without right, there is no ground upon which a promise to pay for it can be implied.* [*Simpson v. Nicholls*, 3 M. & W. 240, s. c. 5 M. & W. (Eng. Ed.) 702 note; 3 M. & W. (Am. Ed.) 244 note. *Ladd v. Rogers*, 11 Allen, 209.]" (See also *Troewert v. Decker*, 51 Wis. 46).

The final opinion delivered in the second or *Pullman* case, by Mr. Justice PECKHAM (171 U. S. 138, *Appendix p. 307*) is most instructive. The learned justice says (*Appendix pp. 317-319*):

"But in the case of this lease, now before the court, a recovery of the rent due thereunder was denied the lessor, although the lessee had enjoyed the possession of the property in accordance with the terms of the lease. It was said (page 60 of the report in 139 U. S.), 'the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract nor according to its terms, but on an *implied contract* of the defendant to return, or, failing to do that, to make compensation for the property or money which it had no right to retain. To maintain such an action was not to affirm, but disaffirm, the unlawful contract.'

"And the opinion of the Court ended with the statement that,

'Whether this plaintiff could maintain any action against this defendant, in the nature of *quantum meruit*, or otherwise, independently of the contract, need not be considered, because it is not presented by this record and has not been argued. This action, accordingly to the declaration and evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant was not liable for.'

"The principle is not new; but, on the contrary, it has been frequently announced, commencing in cases considerably over a hundred years old. It was said by Lord MANSFIELD, in *Holman v. Johnson*, 1 Cowper, 341, decided in 1775, that 'the objection that a contract is immoral or illegal as between the plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.'

"The cases upholding this doctrine are numerous and emphatic. Indeed, there is really no dispute con-

cerning it, but the matter of controversy in this case is as to the extent to which the doctrine should be applied to the facts herein. Many of the cases are referred to and commented upon in the opinion delivered in the case in 139 U. S. 24, already cited. The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it. For illustrations of the general doctrine as applied to particular facts we refer in the margin to a few of the multitude of cases upon the subject.

"They are substantially unanimous in expressing the view that in no way and through no channel, directly or indirectly, will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract, where, in order to maintain such recovery, it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, *and which in justice he ought to recover. But courts will not in such endeavor permit any recovery which will weaken the rule founded upon the principles of public policy already noticed.*"

With reference to the two *Central-Pullman* cases, it is further to be observed not only that each case dealt most particularly with the question of *ultra vires*, but that the tenderness there exhibited toward one of the parties to an illegal contract concerned only that party which had not repudiated the agreement.

Mr. Justice GRAY, in the *Vandalia* case (*Appendix* p. 265), indicated that even in case of a contract void because *ultra vires*, an agreement to return property transferred will not be implied for the benefit of the repudiator at his suit:

"This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him, and had no right to retain. *Spring Co. v. Knowlton*, 103 U. S. 49; *Logan Co. Bank v. Townsend*, 139 U. S. 67, and cases there cited.

"But the case is one in which, in the words of Mr. Justice MILLER in a case often cited in this opinion, the court will not disturb the possession of the property that has passed under the contract, but will refuse to interfere as the matter stands. *Penn. R. R. Co. v. St. L. A. & T. H. R. R.*, 118 U. S. 290, 316-317."

This distinction is already drawn between cases of *ultra vires* contracts and illegal contracts; for it is difficult to understand how justice requires rescission or return for the protection of the party whose reception and retention of the agreed consideration of his contract has not been repudiated or disputed by the other party. (See *Pittsburg Carbon Co. v. McMillan*, 119 N. Y. 46). Full justice is done to the repudiating complainant by permitting him to retain the consideration which he himself originally fixed and accepted as sufficient for his contract which and on that basis he has permitted the other party fully to execute.

Obviously, Mr. Justice PECKHAM'S qualifications of the general rule, *in pari delicto*, was not required by the facts of the case before him, nor was it intended to apply to any case in which the repudiator of the contract was seeking the aid of the court.

Upon this point, the view of Mr. Justice PECKHAM is clearly expressed as follows, in a later portion of his opinion in the same case (See *Appendix* p. 327):

"The property was placed in its hands by the lessor and in accordance with terms of the agreement. It was not then impressed with any trust according to any definition of that term known to us. Although the the title did not pass and was not intended to pass, the lessee did nothing with the property other than was justified by the lease. His liability is based only upon an implied promise to return or make compensation therefor. This implication of a promise would not arise until one or the other party chose to terminate the lease, for the law implies such promise in order

only that justice, so far as possible, may be done. So long as neither party takes any objection to the agreement, and both carry it out, there is no room for any differences, and no promise to return the property or make compensation is necessary, and none is therefore implied. The use of the property is lawful as between the parties, so long as the lease was not repudiated by either, and the rent compensates for the use. After the repudiation the promise is then implied and it is fulfilled by the payment of the value of the property at the time the promise is implied and interest thereon from that time."

FOURTH. The complainants' case rests upon and requires an exhibition of the illegal contract of sale and delivery of November 18, 1901. The complainants' contention to the contrary is that which in all such cases usually but unsuccessfully, is urged by the repudiator.

In *Myers v. Meinrath* (101 Mass. 366, *Appendix p. 86*), exactly the same contention was made and was rejected by the Court in the following language (*Appendix p. 89*).

"The contract was completely executed on both sides, the parties are in *pari delicto*, and by refusing to aid either party *in* the attempt to restore himself to his former position, we leave him in the condition in which he has placed himself by his own illegal conduct. That, as we understand it, is the aim of the courts in applying the general rule upon this subject.

"*The plaintiff contends that the rule does not apply, because he does not seek to enforce any rights which depend at all upon the illegal transaction; that both the legal title which he asserts, and the proof by which he maintains that title, not only omit to disclose, but utterly disregard the unlawful sale; whereas it is the defendant who is obliged to set up the illegal conduct of himself and the plaintiff alike, in order to justify his retention of the plaintiff's property. But the illegality lies directly in the course of events which placed the property in the hands of the defendant, and made it necessary for the plaintiff to resort to this suit to regain it. It is*

inseparably connected with the origin of the cause of action, and it is immaterial which party discloses it to the court. Gregg v. Wyman, 4 Cush. 322. *Duffy v. Gorman*, 10 Cush. 45. The ends of justice are found to be best secured by permitting it to be thus administered upon one of the two offending parties at the instigation of the other."

Taylor v. *Chester* (L. R. 4 Q. B. 309 ; 1 English Ruling Cases, 488 ; *Appendix* p. 1) is the great leading case, and in it exactly the same contention was made by the late Lord Chancellor Herschell (*Appendix* pp. 2–3) and was rejected by the Court (MELLOR and HANNEN, JJ.).

These authorities describe and determine the position of the complainants. They seek to recover property in possession of the defendant Securities Company, and therefore presumably its property. To overcome this presumption, they disclose an executed contract of sale by Harriman and Pierce. This, however, instead of weakening, would confirm the presumption of ownership by the Securities Company. Therefore they call attention to and rely upon the illegality of that contract, and make such illegality the ground of their prayer for a return of the consideration by them delivered under the contract.

Nor is this all. In Article IX. of the amended bill of complaint, the complainants allege and seek affirmatively to enforce a particular stipulation of the contract of sale. The defendants deny that there was any such stipulation, but its mere assertion by complainants invalidates their prayer for the relief, if any, to which otherwise they might be entitled. The rule is thus stated in Story's Equity Jurisprudence (13 ed., vol. 2 ; p. 301 ; *Appendix* p. 371).

296*a*. But where a party to an illegal or immoral contract comes himself to be relieved from that contract or its obligations, he must distinctly and exclusively state such grounds of relief as the court can legally attend to ; *and he must not accompany his claim to relief, which may be legitimate, with other claims and complaints which are contaminated with the original*

immoral purpose ; for if he sets up as a ground of relief the non-fulfillment of the illegal contract on the other side, and thereby that he is released from his obligation to perform it, that shows that he still relies upon the immoral contract and its terms for relief, and therefore the court will refuse it. (See also *McMullen* v. *Hoffman, Appendix* pp. 330, 340 ; *Trist* v. *Child*, 21 Wall. 441-8.)

The claim asserted in Article IX. challenges close consideration. *It asserts that Harriman and Pierce* turned over to the Northern Securities Company a majority of the total stock, constituting the control of the Northern Pacific Company. If this be true, then Harriman and Pierce were the efficient cause and agents of the illegal combination.

Clearly then the complainants are proceeding upon the illegal contract.

FIFTH. The adjudication that the transaction of November 18, 1901, was *in virtue* of an illegal combination, does not constitute an adjudication that the Securities Company has no title to the certificates in its own name and its own possession ; but even if such an effect were to be attributed to the decree of April 9, 1903, the possession of the Securities Company would not be disturbed at the instance of the complainants, who are *in pari delicto.*

In all such cases the defendant's possession is a sufficient answer to the plaintiff's demand ; both because (*a*) such possession stands as the equivalent of a title in the defendant, and because (*b*) to discourage such transactions, courts will be deaf to the clamor of a complainant *in pari delicto* (See cases in appendix).

The condition of the possessor is so much better than even that of the original owner, that he can recover the property not only from a stranger but from the original owner, if by chance the latter has been able to repossess himself of the property. (See cases in appendix.)

The result of many authorities is accurately stated in the following section of Harris on Sunday Laws (*Appendix*, p. 375):

"§ 169. *Sale — Possession — Rights — Creditors.*— Where the possession of property is acquired or obtained by contract of sale on Sunday, though the contract be illegal, the possession is by permission and he may retain it as against his vendor or anyone claiming under him, and against the creditors of his vendor, *not that he has any legal title which the law will protect, but because his vendor cannot be heard to set up a claim to it, and it is the inability of the vendor which protects the possession of the vendee, and is, to him, in effect, the same as a sufficient title.* Then, if he cannot recover it, his creditors cannot subject it to the payment of his debts, and it is not subject, in the hands of the vendee, to attachment or execution against the vendor." (See *Markley v. Mineral City*, *Appendix* p. 229, and the well-considered case of *Block v. McMurry*, *Appendix* p. 105).

The right of the possessor, and the right resulting simply from the fact of possession, are demonstrated to be the foundation and the meaning of the rule, in the philosophical discussion of Mr. POMEROY in Sec. 939 of his Equity Jurisprudence (*Appendix* p. 367).

At the request of one wrongdoer, the courts will not disturb the possession of the other, whether with or without title.

"If the contract," observes Domat, "is unlawful only on the part of him who receives, and not on the part of him who gives, he who has given money under the contract may recover it back, although the contract has been fulfilled by the receiver of such money. *But if the contract is unlawful both on the one side and on the other, as if one party gives money to a judge to gain his cause, or one person gives money to another to induce him to commit a crime, he who has thus given his money is justly deprived of what he has expended, and cannot recover it back.*" (Les Lois Civ. liv. 1, tit. 18, sect. 14, 5.) Addison on Contracts, *Appendix* p. 374.

"Now, how does the law stand upon the subject? If a plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has

been guilty of illegality, then the Courts will not assist him in his cause of action. This was decided in *Taylor v. Chester* (Law Rep. 4 Q. B. 309) where the illegality was pleaded, and also in *Begbie v. Phosphate Sewage Co.* (Law Rep. 10 Q. B. 491), where it was not pleaded, but, the fraud being apparent, the Court would not interfere." Per A. L. SMITH, L. J.—*Scott v. Brown*, *Appendix* p. 26.

Neither the illegality of a transaction, nor an adjudication of its illegality, results in leaving the title to property transferred as a part of the transaction, in the transferor.

The true effect of such a finding of illegality has been stated by the Supreme Court of New Hampshire in a much approved and often cited case, as follows:

"The transaction being illegal, the law leaves the parties to suffer the consequences of their illegal acts. The contract is void, so far as it is attempted to be made the foundation of legal proceedings. The law will not interfere to assist the vendor to recover the price. The contract is void for any such purpose. It will not sustain an action by the vendee upon any warranty or fraud in sale. It is void in that respect. *The principle shows that the laws will not aid the vendor to recover the possession of the property, if he have parted with it. The vendee has the possession, as of his own property, by the assent of the vendor; and the law leaves the parties where it finds them. If the vendor should attempt to retake the property, without process, the law finding that the vendee had a possession which could not be controverted, would give a remedy for the violation of that possession. When then it is said that the contract is void, the language is used with reference to the question whether there is any* legal remedy upon it (see 5 Barn. & Cress., 406, *Fennell v. Ridler*, opinion of BAYLEY, J.)". *Smith v. Bean*, 15 N. H., 577; *Appendix*, p. 125.

This effect of an illegal transaction is stated in other words by the Supreme Court of Massachusetts as follows:

"Upon this principle, possession, required from an illegal transaction, or by a contract fully executed, will often avail the party holding it, as a sufficient

title. Neither party is allowed to impeach its validity by asserting the illegality of his own act. The transaction takes effect from the disability of the parties to assert any right to the contrary. The Court does not give it effect, but simply refuses its aid to undo what the parties have already done" (Citing authorities.) *Myers vs. Meinrath*, 101 Mass., 366, *Appendix*, page 86.

"He (a vendor) could only impeach a sale by showing the illegality of his own act, which in the case of an executed and completed contract he certainly cannot do. *This disability on his part to reclaim it would avail the party holding it, as a sufficient title.*" *Horton v. Buffington*, 105 Mass., 399; *Appendix*, p. 90.

The same principle is necessarily involved in every one of the multitude of cases in which the courts have refused a recovery of property illegally transferred. The effect of the finding of illegality is still to leave in the transferee possession and a right of possession which no one can question, and which is therefore equivalent to title.

Seventh.

The complainants confessedly *participes criminis* have not relieved themselves from the application of the rule, *in pari delicto potior est conditio possidentis.*

The complainants claim exemption from the doctrine *in pari delicto* upon several grounds, viz:

(1) That the parties acted in good faith and without intention to violate the law;

(2) That the transaction was not *malum in se* but merely *malum prohibitum;*

(3) That the parties were not *in pari delicto,* because not original or active parties to the combination;

(4) That public policy will be promoted by the return of the stocks; and

(5) That the defense founded on the doctrine is not available to the Securities Company as it was merely a depositary, a custodian or an agent.

None of these pleas can be sustained.

First. All doubt as to complainants' contention as to their relation to the alleged illegal contract, has been dissipated by the frank statements in Article VI. of the *second amended bill.* (See also affidavit Winslow S. Pierce, R. p. 185).

They entered the combination with full knowledge of its character and purpose, and for more than two years participated in its proceedings. But they seek to offset their admission by an allegation that then and during the pendency of the Government proceedings they believed the transaction to be lawful. This we do not doubt, for such was the honest belief of all parties until the recent adverse decision by a court nearly equally divided. However, the good faith of the parties could not change the legal effect of the act, and they must be presumed to know the law (Lawson on Presumptions, pp. 526, 532–536).

Ignorance of the law, however innocent, cannot give the complainants any advantage over their associates in the combination who were equally innocent. The *delict* upon which the complainants rely, and as a basis of their cause of action, was a *delict* in which all shared alike. Whatever innocence can be claimed, can be claimed by all: whatever guilt is to be ascribed is to be ascribed to all.

In their brief of January 23, the complainants' counsel, conceding the general rule of law as above stated, declared that

" it has been established by innumerable decisions that
" relief will be granted from the consequences of a mis-
" take of law whenever the mutual mistake is clearly
" proved or admitted and by reason of such mistake
" the party against whom relief is sought would other-
" wise secure an unfair advantage."

The point of this statement naturally is to be found in its termination. The legal proposition is stated too

broadly, and strains the authorities cited in its support. But even as stated, it is applicable only in those cases in which "the party against whom relief is sought would otherwise secure an unfair advantage."

As we have already demonstrated, the present case is not one of that kind, for by the retention of the Northern Pacific stock the defendant would not obtain "an unfair advantage"; it would merely retain that which at the outset was declared by the complainants to be worth exactly $91,407,500, payable as to $82,491,871 in Northern Securities stock at par, and as to $8,915,629 in cash. It cannot be that the defendant takes an unfair advantage of the complainants in retaining the exact consideration that originally was considered and declared by both parties to be fair, and which since that time certainly has not declined in market value. Under such conditions, no mistake of law, whether mutual or unilateral, whether admitted or contested, would permit the complainants to recover back the consideration which they voluntarily delivered to the defendant. This was precisely held in the recent case of *Harse v. Pearl Life Ins. Co.* (L. R. [1904] 1 K. B. 558: *Appendix* p. 35), where it was adjudged that a person who has made an illegal contract and has sustained a loss in consequence of a misstatement of law, must submit to that loss, unless the statement on which the complainant acted was fraudulently made: unless it can be said that the statement made by the defendant put the complainant in a worse position than the defendant, the parties were on an equal footing with regard to the transaction. Even in Judge TAFT'S opinion in the case of *City of Detroit v. Detroit City Ry. Co.* (60 Fed., 163), cited upon page 54 of complainants' brief of January 23, 1905, it is declared that the exemption applies only in cases where the stipulation of the contract is not binding because *ultra vires*, and not in cases where the stipulation is immoral or unlawful or against public policy.

In the *Vandalia* case (heretofore fully considered), and indeed generally in the cases cited in the *Appen-*

dix to this brief, it will appear that the parties proceeded upon a common mistake as to the law which ultimately was decided against them. The generality of the rule, as well as its reason was stated by Mr. Justice STORY in *Barlow v. U. S.* (7 Peters, 404), where he held directly that mistake as to the law did not prevent a forfeiture to the United States of sugar entered under a false denomination, and said that—

"The whole course of jurisprudence, criminal as well as civil, of the common law, points to a different conclusion. It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, *either civilly or criminally;* and it results from the extreme difficulty of ascertaining what is, *bona fide*, the interpretation of the party, and the extreme danger of allowing such excuses to be set up for illegal acts to the detriment of the public. There is scarcely any law which does not admit of some ingenious doubt."

The truth is that in the present case each party had full knowledge of the facts; each party was chargeable with knowledge of the Federal anti-trust act; and neither party would now deny that it then had actual knowledge of that act. The only mistake was in their supposition that the known statute would not be held applicable to the known state of facts. Under such conditions, neither party can plead ignorance of the law as a defense against the other party.

"When the facts are known to both parties, and each acts on his own judgment, the court will not rescind the contract because it may or does turn out that they or either of them were mistaken as to the legal effect of the facts or the rights or obligations of the parties thereunder; and particularly when such mistake can in no way injuriously affect the right of the party complaining under the contract or prevent him from obtaining and receiving all the benefit contemplated from it and to which he is entitled under it" *(Seeley v. Reed*, 25 Fed. Rep. 361).

SECOND. The distinction between *malum in se* and *malum prohibitum* cannot avail the complainants, who were parties to a transaction hostile to public policy,

condemned by statute, and constituting a criminal offence.

Even if, in actions for recission, the distinction be retained for the benefit of the less guilty party, the transactions now in question would be *malum in se* in the view of PARKER, C. J. (*Irwin* v. *Curie*, 171 N. Y. 409-415; *Appendix* p. 227). In such cases there is no balancing of the guilt of the respective parties; the courts absolutely refuse relief to any of them.

"The cases in which the courts will give relief to "one of the parties on the ground that he is not *in* "*pari delicto*, form an independent class entirely dis- "tinct from those cases which rest upon a disaffirm- "ance of the contract before it is executed. It is "essential to both classes that the contract be merely "*malum prohibitum*. If *malum in se*, the courts will "in no case interfere to relieve either party from any "of its consequences" (*Tracy* v. *Talmage*, 14 N. Y. 162-181; *Appendix* p. 156).

This is the rule also of the civil law, as cited from Domat by Mr. Addison (*Appendix*, p. 374):

"If the contract is unlawful both on the one side "and on the other, as if one party gives money to a "judge to gain his cause, or one person gives money "to another to induce him to commit a crime, he who "has thus given his money is justly deprived of what "he has expended, and cannot recover it back."

In cases not involving moral turpitude, the doctrine *in pari delicto* is generally applicable, as declared by Judge GRAY, for the Circuit Court of Appeals, in the very recent case of *Equitable Co. v. Wetherill* (127 Fed. Rep., 946; *Appendix*, p. 359). He said:

"It is claimed by the plaintiff in error, that the contract testified to by Wetherill was in violation of this enactment, and therefore illegal and void.

"It is sufficient answer to this point to say that the law does not help those, who have made an illegal contract, to recover back the money paid in pursuance thereof, but leaves them where it finds them. The contract was executed. * * * 'Where money has

been paid upon an illegal contract, it is a general rule that if the contract be executed, and both parties are in *pari delicto*, neither of them can recover from the other the money so paid.' *Spring Co. v. Knowlton*, 103 U. S. 49, 58, 26 L. Ed. 347; Pollock on Contracts, star p. 332; Leake on Contracts. 774."

In the absence of any proof to the contrary, all the parties to a contract hostile to public policy are presumed to be *in pari delicto.*

" According to the authorities, then, it would seem " to be well settled that in reference to all acts or con- " tracts, which are unlawful on account of their im- " morality, or their tendency to promote it, or because " they are hostile to the public policy, the parties " thereunto are regarded as being *in pari delicto.*"
White vs. Hunter, Appendix p. 128.

THIRD. The plea that the doctrine does not apply to Harriman and Pierce because they were not original parties to the combination, is of no legal consequence; and the plea that they were not active parties, is not well founded in fact.

" Anyone who, after a conspiracy is formed, and who " knows of its existence, joins therein, becomes as " much a party thereto from that time, as if he had " originally conspired." (DILLON, J., in *U. S. vs. Babcock*, 24 Fed. Cas., 913–915).

The extent and the activity of the continuous participation of Harriman and Pierce, have been sufficiently indicated (see Mr. Pierce's affidavit, R. p. 185). The doctrine does not rest upon an ascertainment of an exact parity, but applies in every case where two persons *sui juris* agree upon a course of action which is in violation of law.

The long continued participation of all the complainants in the transaction establishes their character as willing and active participants and not as victims. The sale of the Northern Pacific shares of the Oregon Short Line was conducted solely by Mr. Harriman,

whose depositions are in evidence. His testimony may be searched in vain for any suggestion that the sale was made under duress or constraint of any kind. But his memory having been refreshed in connection with these recent proceedings, Mr. Harriman now avers (R. p. 157–158):

"I was then urged by Messrs. Morgan & Co. to dis-
"pose of the Northern Pacific stock held by the Oregon
"Short Line Company *on the ground that it would be*
"*a minority holding under the plan of conversion if*
"*consummated, that the majority would be held by*
"*the holding company, and that there would probably*
"*be no market for any such minority holding.* They
"further stated that upon the organization of the pro-
"posed holding company, they would be prepared to
"purchase the holdings of stock of the Northern Pa-
"cific owned by the Oregon Short Line and to pay
"therefor in the stock of the holding company *at the*
"*rate of 115 for all our stock*, which would be the rate
"at which the holding company would take in the
"common stock held by them and Mr. Hill and his
"associates, and all other parties, *and they thereupon*
"*offered me those terms.* I took the matter under
"consideration and conferred with members of the
"board of directors of the Oregon Short Line Com-
"pany. The conversion under conditions *reducing*
"*the Oregon Short Line holdings to a minority*
"*was then a foregone conclusion* unless we were
"prepared to commence litigation, which would
"be protracted and which would probably be detri-
"mental to the value of all railroad securities in
"view of the condition of the financial markets re-
"sulting from the panic of May 9, 1901. The alterna-
"tive of not accepting shares of the holding company,
"but holding the minority interest in the Northern
"Pacific Company, *involved serious risks of great*
"*loss, as it would then be to the interest of the holding*
"*company to sacrifice the Northern Pacific for the*
"*benefit of the Great Northern Company.* It was,
"therefore, finally agreed with Messrs. J. P. Morgan
"& Co. that the Oregon Short Line Company would
"turn over its entire holdings of Northern Pacific
"stock for $82,491,871 par value of the stock of the
"holding company and $8,915,629 in cash."

On the part of Messrs. J. P. Morgan & Co., who alone appeared as purchasers, there was no exaction or request, but simply an offer, to obtain for Harriman and Pierce terms as good as (and ultimately made better than) those offered to any other holder of Northern Pacific shares. The offer was accompanied not by any threat or by any intimation that the Securities Company required the shares, but merely by the suggestion that there would be no market for minority shares. Mr. Harriman, however, seems to have been governed not by any consideration of this suggestion, but by his own idea that unless he sold "*it would be to the interest* of the holding company to sacrifice the Northern Pacific for the benefit of the Great Northern Company. *It was, therefore, finally agreed to sell.*"

In other words, his plea simply is that it would have been to the pecuniary loss of the Oregon Short Line interest had it failed to sell its stock to the Northern Securities Company. It is believed that no precedent can be found for such a contention in a court of equity —that the culpability of a party to an illegal transaction should be made to turn upon the question of financial gain. But whether or not novel, the contention is untenable, and naturally enough has found no place in the bill of complaint, notwithstanding it has been twice amended.

FOURTH. The defendants cannot consider it necessary to refer to the statement of the general principles concerning public policy as applicable to this case, for the public interest under the Anti-Trust Act is within the sole and exclusive jurisdiction of the Attorney-General of the United States, as held by the Supreme Court in the case of *Minnesota v. Northern Securities Co.* (194 U. S. 48), and by Judge THAYER in his opinion of April 19, 1904. The facts have been fully considered under our *First Point* (p. 25).

FIFTH. The plea that the defense founded on the doctrine *in pari delicto* is not available to the Securi-

ties Company, because it was merely a depositary and custodian or agent, has no proper application to the conditions in the present case.

The complainants' highly technical argument on this point depends entirely upon their contention that Mr. Justice HARLAN has found the Securities Company to be merely a custodian, and seems to be as follows:

The doctrine *in pari delicto* applies only to transactions between two principal parties, each capable of wrongdoing, and each equally doing wrong. But, conceding that Harriman and Pierce were wrongdoers, their wrongdoing is immaterial, because they contracted with a party which, though acting ostensibly in its own right, did not in fact do so, but really as a depositary, or custodian, or agent, or trustee, or stakeholder, for Harriman and Pierce. Such a party, it is said, cannot be held to be *in* PARI *delicto* with Harriman and Pierce, however guilty they may have been, and consequently as against them it cannot avail of a defense founded on this maxim, because *it* was not as guilty as they!!

Though regarded as only an artificial person, the Securities Company, as principal, had power to make the contract, as clearly as the Oregon Short Line Company, a similar artificial person, has power to elect and to seek to rescind the contract. Whether viewed as the executant of the illegal will of the thinking and acting parties, or merely as a custodian, the Securities Company was in fact (disregarding Morgan & Co.) the only party to the contract with Harriman and Pierce.

But, though the correctness of this afterthought were to be conceded, it would not follow that the complainants could recall property delivered to the Securities Company, regarded merely as custodian or agent. Even if a custodian, or agent, it received that property for a definite purpose, to which it has applied the same. With the full approval of complainants, it has issued to other parties, to the extent of more than two hundred million dollars, certificates of its new stock representing an interest in this property.

It may be observed that in any case where it appears that without meaning to vest any title in the custodian, possession has been delivered to accomplish an illegal purpose, the depositor has the right to demand the surrender of that possession, which, if allowed to continue, will promote the carrying out of the illegal purpose. In such case the only right that could be set up by the custodian would be a right to hold for the illegal purpose. If, however, in pursuance of the illegal purpose, it is intended to pass title, and possession accompanying the title is delivered, the party who, because of the illegality, desires to destroy the title and to resume the possession is not under the cases permitted to succeed. The cases which are assumed to hold otherwise are those of illegal contracts which have not been executed, and where a wrongdoer seeks to resume the ownership. In this case, the complainants attack the possession of a defendant who claims title by virtue of a contract intended to be a contract of sale; a defendant who has never consented to be custodian, and who has not repudiated the contract.

There are various kinds of custodians—some who do not claim any title, others who do. As already argued, it was not necessary either for the Circuit Court or for the Supreme Court to pass upon or to define the extent of the title conferred upon the Securities Company, if a custodian, and they did not pass upon such title.

Whatever may have been in the mind of Mr. Justice HARLAN when he applied to the Securities Company the term "custodian," clearly he did not employ that term as signifying "a mere depositary or custodian to execute the illegal will of the thinking and acting parties to the forbidden combination." This will be manifest upon reference to the complete sentence of his opinion (193 U. S., 354):

"The decree, if executed, will destroy not the prop-
" erty interests of the original stockholders of the con-
" stituent companies, but the power of the holding

" corporation, as the instrument of an illegal combina-
" tion, OF WHICH IT WAS THE MASTER SPIRIT, to do that
" which, if done, would restrain interstate and inter-
" national commerce.

Certainly something more than a mere custodian or depositary is the *master spirit* of the illegal combination. The vital and dominating character of the Securities Company was the very cornerstone of the Government suit. The power to control the railway companies was imputed not to the original parties to the combination, but to the Securities Company itself, acting, of course, as controlled by the holders of a majority of its capital stock, among whom were the individual parties to the Government suit, owning less than a majority.

The Circuit Court also recognized the Securities Company as a personality, dominating the railway companies, and made the Company and not its stockholders the direct object of its decree. In varying form, this was thrice stated by Judge THAYER as follows :

" When the Securities Company was organized, *it*
" *assented to and became party to the scheme* that had
" been devised by its promoters before it became a
" legal entity."

And again :

" In this instance, as we have already said, the
" *Securities Company made itself a party to a com-*
" *bination* in restraint of interstate commerce that
" antedated its organization as soon as it came into
" existence, doing so, of course, under the direction of
" the several individuals who promoted it."

And again :

" It is the common experience of mankind that the
" acts of corporations are declared and their policy is
" controlled *by those who own the majority of their*
" *stock.*"

The several individuals who promoted the Securities Company owned much less than a majority—barely twenty-four per cent. of its stock.

SIXTH. In no sense is the Securities Company a custodian in the sense of a stakeholder. A stakeholder occupies a position alike to that of a holder in escrow; he pays nothing for his possession, and has not the slightest interest in its continuance. The Securities Company has in itself, if not a title, a possession as of its own property, by assent of the complainants.

Even though the Securities Company be regarded as having no rights greater than those of a stakeholder, it cannot be called upon to return property in which it has conferred rights upon its stockholders according to the intention and direction of Harriman and Pierce. Though money may be recalled from a stakeholder before he has paid it over, it cannot be recovered from him after such payment. The cases stating and illustrating this familiar rule are too many to require extended citation (See *Howson* v. *Hancock*, 8 Term, 575; *McCullum* v. *Gourlay*, 8 Johns. 147; *Ball* v. *Gilbert*, 12 Met. 397–405. *Appendix* p. 75).

The Securities Company dealt with this stock, and created new rights therein exactly as was intended and directed by Harriman and Pierce, and they cannot now disaffirm the act of their agent or trustee (even if only such) to the disadvantage of third parties.

Eighth.

If, at any time, the complainants might have rescinded the executed contract of November 18, 1901, and have demanded the return of the consideration, any such right has been lost by their acquiescence and by the creation with their consent of superior equities of third parties.

First. The equities of the persons who hold stock of the Northern Securities Company bought in the open market since the complainants became a part of that company, must prevail against the complainants' claim.

It appears by the records of the Northern Securities Company, that since Harriman and Pierce transferred their Northern Pacific stock to the defendant on the 19th of November, 1901, there have been approximately 16,000 transfers of stock upon the books of the Northern Securities Company. The stock is now in the hands of 2,571 separate holders (R. p. 269), many of whom are residents of Great Britain, France and other parts of Europe (R. p. 268). All of the purchasers of this stock since the 18th of November, 1901, have purchased an equitable interest in the entier corporate assets of the Northern Securities Company, including the Northern Pacific stock transferred to that company by the complainants, and all of them were justified both by the fact of complainants' transfer and by complainants' subsequent conduct, in believing that they were acquiring a valid interest in the transferred Northern Pacific stock (R. p. 272, 275). This point is hereinafter treated in detail.

It appears by the minutes of the Northern Securities Company that on the 22d of January, 1903, the Board of Directors of that company, Messrs. Harriman, Schiff and Stillman being present and taking part in the meeting, and no negative vote being recorded, authorized the sale by the company itself for cash at a price much above par of 75,000 shares of Northern Securities stock (R. p. 319). Purchasers of these shares parted with their money in exchange for an equitable interest in all the corporate assets of the Northern Securities Company (R. p. 272, 275), including the Northern Pacific stock transferred to that company by complainants, and they acquired no other rights whatever. The complainants more than a year after the original transaction were active participants in making the sale of this equitable interest to them.

It appears by the Article XVII. of the amended bill, that if the complainants get back from the

defendant the Northern Pacific stock which they claim, the value of what they get will exceed by the sum or value of over $10,000,000 the aggregate value of all the complainants would receive in a *pro rata* distribution of the assets of the defendant among its shareholders.

This $10,000,000 would be taken away by the complainants from the shareholders to whom they permitted stock to be sold and to whom they sold stock of the Northern Securities Company.

It is difficult to conceive of any principle of equity on which men can go into a combination of this kind as complainants went into this combination, transfer their stock to a holding company, invite the public to come in and purchase interests in the stock so transferred, and then take back the stock because it has risen in value and they can make $10,000,000 out of the transaction. As between the original organizers and directors of the corporation and the general public who came in and purchased stock offered by them for sale and upon the faith of their assertion that the transaction was legal, there can be no question of relative culpability or as to which is entitled to the protection of a court of equity. The subsequent purchasers in the open market had, of course, far inferior knowledge of the facts, and far less opportunity to judge of the validity of the corporate title to its apparent assets; and so far as foreign purchasers were concerned they were not at all chargeable with knowledge of the law. As to all of the subsequent purchasers, their fault, if any, was in relying upon the implied representation of the complainants and their associates that the corporate title to its assets was valid. To permit the men who induced them to part with their money upon the faith of that representation to take those assets away for their own profit, would be a grotesque perversion of equity.

SECOND. If complainants were otherwise entitled to relief, they would have forfeited that right by their

laches and their failure in due time to elect to stand upon a rescission or repudiation of their transfer.

The transfer was made on the 18th of November, 1901. In appears by the tenth article of the bill that on the 10th of March, 1902, the bill of complaint was filed in the Government suit by the Attorney-General of the United States declaring that the transaction was unlawful. Then certainly, if not before, it was the duty of the complainants to elect to claim a rescission of their transfer if they were ever to do so. They did not so elect. On the contrary, they continued to take the benefits and exercise the rights of stockholders in the Northern Securities Company.

On the 17th of July, 1902, four months after the Government bill was filed complainants Harriman and Pierce and the Oregon Short Line Company, continuing to exercise their rights of ownership over the 824,000 shares of stock of the Northern Securities Company which they had received as part consideration of the transfer, pledged that stock to the Equitable Trust Company under the trust indenture set out in the bill of complaint. The terms of the indenture show that they then transferred to every holder of the bonds issued thereunder a part of their interest in the general assets of the Northern Securities Company represented by the pledged stock, for the indenture assures to the bondholders not merely payment of interest upon the bonds, but a proportional share of all the dividends paid by the Northern Securities Company upon the stock pledged.

Nearly a year after the Government bill was filed, the complainant Harriman and his associates Messrs. Schiff and Stillman joined with the other members of the board of directors of the Northern Securities Company in the sale of stock authorized by that board on the 22d of January, 1903.

On the 9th of April, 1903, the decree of the Circuit Court was pronounced in the Government suit adjudging the transaction to have been illegal. Still, the complainants did not elect to proceed as for rescission,

but stood upon their rights as shareholders. It was not until after the 22d of March, 1904, when the defendant company had resolved upon a ratable distribution of its assets among its shareholders, and the complainants found they could make a profit of $10,000,000 over and above their ratable share in such distribution by claiming a rescission based upon facts known to them for years before, that they elected to claim such a rescission.

The facts were known to complainants from the beginning. The unlawfulness of the acts done was brought sharply to their attention by the filing of the Attorney-General's bill. How much of the increase in value of the Northern Pacific stock occurred during the two years following the filing of that bill, this record does not disclose. Presumptively, most of it. How much of that increase of value came from the continued possession of the stock, and the peaceable control of the Great Northern as well as of the Northern Pacific in the same hands during that period of two years' delay, no one can tell—presumptively much of it. It is certain that for two years, with a full knowledge of all the facts, the complainants did not consider it for their advantage to claim a rescission, and did not claim it. It is a fundamental rule that one who claims a rescission must make his election promptly upon learning the facts. He cannot sit on the fence waiting for future events to determine on which side it will be for his advantage to jump. Still less can he jump first on one side and then climb over to the other side, as the complainants are seeking to do in this case.

THIRD. The complainants have not merely failed to elect affirmatively to proceed upon a rescission or repudiation of the transfer of November 18th, but by the trust deed to the Equitable Trust Company set up in the bill they irrevocably elected not to claim a rescission, and to stand upon their title to the Northern Securities stock.

The seventh article of the trust deed was manifestly drafted with a view to what should be done, if the then pending Government suit should be decided in favor of the Government. That article provides that if a majority of the stockholders of the Northern Securities Company shall join in a sale of their stock, then upon the request of the Railway Company the Equitable Trust Company shall join with them ; that in case a majority of the stockholders shall participate in a plan of reorganization or readjustment of the Securities Company, then upon request of the Railway Company the Equitable Trust Company shall join with them; and that in case of the consolidation, union or merger with any other corporation of the Securities Company, *or the sale of its property or the distribution of its assets, the trustee shall receive such amounts of stocks, bonds or other securities, or of either or all of them, as the holders of the pledged shares of stock of the Securities Company shall be entitled to receive, and upon receipt thereof shall surrender the deposited stock certificates.* This duty is absolute; it depends upon no request of the Railway Company. Whenever the Northern Securities Company shall sell its property, it is the duty of the trustee to receive its proportionate share as a stockholder. Whenever the Northern Securities Company shall distribute its assets, it is the duty of the Equitable Trust Company to receive its distributive share as a stockholder. The Equitable Trust Company now, by the voluntary act of the other complainants, holds the 824,000 of Northern Securities stock under this provision requiring it under the contingency which has in fact arisen not to repudiate its title to the stock, but to take its distributive share as a stockholder under the resolutions of the Northern Securities Company set forth in the bill.

The Trust Company which in fact holds the stock has no power under the terms of the trust to repudiate its title. The other complainants in parting with the stock to the Trust Company parted with the power to

repudiate the title which they transferred. No election to repudiate the title is now possible.

FOURTH. The complainants' attempted explanation of their gross *laches* as a reasonable delay during the pendency of the Government suit is not entitled to the favorable consideration of a court of equity. During the prolonged period of their culpable silence, lasting more than two years after the Government suit was begun and more than one year after its decision by the Circuit Court they have permitted changes of condition on the part, of thousands of persons relying upon the Securities Company's ownership of the railway shares (R. p. 272, 275). This is shown by the fact among other things, that during that period there were more than 16,000 transfers of Securities stock (R. p. 266).

But, the charge against complainant is of something more than passive laches. They are confronted also by the consequences of their affirmative and persistent election to get all possible benefits out of their maintenance of the position of the Securities Company and the chance that this court would reverse the Circuit Court. Continuously during the pendency of the Government suit, and with full knowledge of the charge of illegality made in 1902 by the Attorney General, and sustained in 1903 by the decree of the Circuit Court, they have persistently asserted and enjoyed all the rights of ownership resulting from the transaction denounced as illegal in that suit. The charge is not only of inexcusable laches, but also of a final and decisive election on their part inducing, and resulting in, a general change of conditions. Their delay has been too long; their election has been too pronounced, and their attempted excuse is too weak to permit the favorable consideration of their tardy and dubious claim for relief regardless of the rights of others.

> " When a party with full knowledge, or at least with sufficient notice or means of knowledge, of

his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity."

Pomeroy's Equity Jurisprudence, § 965.

In *Boston Railroad v. New York Railroad* (13 R. I. 264,) certain stockholders sought to set aside a sale of the road. Confessedly this sale was *ultra vires;* but they had stood by and raised no objection until the rights of other parties had intervened, and it was held that they were barred from any relief in equity. The court called attention to the reason for refusing these people any relief—that the property had passed to a new corporation including still other new and different stockholders, and that other bondholders' rights had intervened.

In *Harwood* v. *Railroad Co.* (18 Wallace, 80), a delay of five years in filing a bill to set aside the sale of a railroad on the ground of fraud, was held too late. The court said:

"Without reference to any statute of limitations, "the courts have adopted the principle that the delay "which will defeat a recovery must depend upon the "particular circumstances of each case. This case "does not show a sufficient degree of diligence to "justify the overthrow of a degree of foreclosure un- "der which new rights and interests must necessarily "have arisen."

In *Haywood* v. *Nat'l Bank* (96 U. S. 611, 617), the court was considering a suit in equity brought by Haywood to set aside the sale of certain stocks by the defendant bank, on the ground that they had been sold by the bank to its directors, who were incapacitated by reason of their office, to purchase the stock, it having been pledged by Haywood to the bank. He waited about four years before bringing a suit. In the meantime the stock had gone up. It was held that he could have no relief. The court said:

"If he had the right originally upon any ground, "to repudiate the sale and re-claim the stock, it was "incumbent upon him by every consideration of fair- "ness, to act with diligence, and before any material "change in the circumstances and in the value of the "stock had intervened."

The court also quotes from *Harwood* v. *Railroad Co. (supra)*, as follows:

"The delay which might have been of no conse- "quence in an ordinary case, may be amply sufficient "to bar relief when the property is of a speculative "character or is subject to contingencies, or where the "rights and liabilities of others have been in the mean- "time varied."

See also *Hoyt* v. *Latham*, 143 U. S. 553, 567.

A delay of about twenty-three months was held sufficient to bar an action by a stockholder, by the Supreme Court of Missouri in the case of *Kitchen v. St. Louis R'y. Co.* (69 Mo. 224). The court adopts the rule laid down by the Supreme Court of the United States in the cases above quoted, and says:

"He has no right to lie idly by until new equities "arise, and speculate on the success or non-success of "the investment or transaction of which he com- "plains.

After citing the case of *Graham* v. *Birkenhead & Cheshire* (2 McNaughton & Gordon, 156), where it was held that where stockholders acquiesced for eighteen

months, having had the means of knowing the acts complained of "by not coming earlier they had precluded themselves from asking for the exercise of the extraordinary jurisdiction of the court," the Missouri court goes on to say :

"The doctrine as recognized in the above cases, is "that the option to avoid such a sale as is here com- "plained of, must be exercised in a reasonable time, "and unless so exercised, equitable relief will be de- "nied, especially when new rights, interests and "equities have arisen, and the parties cannot be re- "stored to their original position."

In the case of *Peabody et al. v. Flint* (6 Allen, 56), the court was considering an action in equity brought by minority stockholders of a corporation for conspiracy and fraud, whereby their interests had been sacrificed, against the corporation and its officers and others, who participated therein. It appeared that the bill was filed March 9, 1860 ; the mortgage complained of had been executed August 20, 1856. A lease to another railroad, which was complained of, had been executed October 1, 1858. It was held that complainants were barred by laches. The court said :

"Every day's delay increased the complications and "the difficulty of making an equitable adjustment of "them. *In the meantime, the stock in the corpora-* "*tions must have been frequently changing hands, and* "*there are no means of adjusting the equities growing* "*out of such changes.* A similar remark is applicable "to the holders of the bonds secured by the mortgage. "The nature of the case required the utmost diligence "in order to prevent injustice. * * * *And a de-* "*cree such as they now seek may injuriously affect many* "*persons who have become stockholders or bondholders* "*during the period of this delay.*"

It may be remarked that this case was decided upon demurrer to the bill, the demurrer being sustained.

In *Dunphy* v. *Travelers' Newspaper Association*, 16 N. E. Rep. 426 (Mass.), the same rule is laid down, and it is said :

" It is a familiar principle of equity jurisprudence " that long continued acquiescence in a course of con- " duct by one interested in it, especially when the " rights of others are affected thereby, will induce the " court to refuse him relief upon his subsequent com- " plaint of it."

This action was brought by a stockholder after three years' delay, and the demurrer was sustained.

In the case of *Kinney* v. *Webb* (54 Fed. 34), the Circuit Court of Appeals, speaking through Judge SANBORN, having under consideration a bill to rescind a sale on the ground of fraud, denied relief on the ground of laches. In that case it had been about five years. The court says, on pages 37 and 38:

" If one would invoke the aid of a court of equity to " enforce such a rescission, he must act promptly, " with no vacillation, no unreasonable delay, no " attempt to speculate upon his option. He must " elect to rescind and steadily and consistently pro- " ceed as far as lies in his power, to place himself and " his purchaser *in statu quo.* * * * He may not " speculate upon his option. The vendee has the " right to know whether the claim for rescission is to " be pressed or abandoned, and that speedily."

In *Grimes v. Sanders* (93 U. S. 55, 62), the court says:

" Where a party desires to rescind upon the ground " of a mistake or fraud, he must upon the discovery of " the facts at once announce his purpose and adhere " to it. If he be silent and continue to treat the prop- " erty as his own, he will be held to have waived the " objection, and will be conclusively bound by the " contract as if the mistake or fraud had not occurred. " *He is not permitted to play fast and loose. Delay* " *and vacillation are fatal to the right which had be-* " *fore subsisted.* These remarks are peculiarly applic- " able to speculative property like that here in ques- " tion which is liable to large and constant fluctuations " in value."

The language of the Supreme Court in that case is certainly most applicable to the matter under consideration.

Ninth.

The complainants have failed to disclose any sufficient equity for their claim.

Thus far the general course of our argument has followed lines laid down by courts of common law and leading to the conclusion that in cases such as this the complainant is entitled to no relief from the Court.

But, the complainants' case is one that could not prevail even in equity, or under a concession as liberal as that suggested in the *Pullman-Central* case (171 U. S. 148, *Appendix* p. 307) by Mr. Justice PECKHAM that, the law will imply a promise *by a repudiator* to return the property or to make compensation therefor.

In fact, and as their bill alleges, they are offered exactly the same treatment as is offered to every other of their fellow stockholders, and as has been approved as fair both by the stockholders and by the Vice Chancellor in New Jersey.

They put in 370,230 shares of Northern Pacific common. They are offered 320,706 shares of Northern Pacific common stock.

They put in 410,850 shares of preferred stock. They are offered 246,389 shares of Great Northern stock.

They received $8,915,629 in cash which they are permitted to retain.

No case has been found in the books where the repudiating parties to an illegal contract have been assisted to recover more than their equitable share from the other party, not repudiating, but offering to do equity.

In the present case, justice, and more than justice, has been offered to, and refused by, the complainants. They insist not that they shall share alike with all their fellow participants, but that they shall receive a disproportionate benefit exceeding $10,000,000.

No similar demand for inequality can be found in

any precedent in equity. This would not be material if the complainants had, as they have not, a clear legal right. But, coming into a court of equity they must do equity, and must submit to the rule that equality is equity. Of course, these rules are not disputed—they are only obscured by the complainant's contentions. Nevertheless they apply, and they are decisive as against complainants.

FIRST. There has been an important change in the relative values of the shares of the two railways; so that to grant complainant's demand would inflict sore injustice upon complainant' associate shareholders.

The *second amended bill of complaint* alleges (Article V., R. p. 3) that originally the Northern Securities Company issued its own stock, and in exchange therefor received railway shares upon the following basis, to wit: $180 par value of its own stock for each Great Northern share, and $115 par value of its own stock for each Northern Pacific share.

Mr. Harriman more than once testified that he understood and agreed that the Securities Company stock was to be issued for the shares of the two railways at these relative valuations, and that upon such mutual understanding he delivered the shares belonging to the Oregon Short Line, and received the Securities stock (R. pp. 215, 238, 239).

"The statement was made to me * * * that "they would give us in part payment a holding Com- "pany's stock on the basis of $115 for Northern Pacific, "and if Great Northern were taken in, on the basis of "$180 for Great Northern" (R. p. 238).

Mr. Harriman testified also (R. p. 204) that the Oregon Short Line Company did not lose by its sale to the Securities Company.

The *amended bill of complaint* (Article XVII., R. p. 381) alleged that the value of Northern Pacific shares, now demanded by complainants, exceeds by more than $10,000,000 the aggregate value of the shares of the two railway companies, which they would receive

upon an equal distribution of all such railway shares ratably among and between all stockholders of the Securities Company. This is due to the fact stated by Mr. Harriman in his affidavit (R. p. 160), that at that date the market value of Northern Pacific shares was about $135, and of Great Northern shares is about $170. In other words, the market value of each Northern Pacific share was $20 more, and the market value of each Great Northern share was $15 less, than the values at which in 1901 all such shares were sold by the former holders and were purchased by the Securities Company.

The *second amended bill of complaint* (Article XVII., R. p. 12), under the stress of the situation developed upon the oral argument, tardily supplements the allegations in the two earlier bills, by stating that this excess of the relative value of Northern Pacific shares existed "*at all times mentioned in this bill*". Of course, the truth of this new allegation must be believed by the complainants. Otherwise they would not have been so particular to make it at this late day. But it is not equally apparent to the defendant, which hesitates to believe that anyone, even less keen and less experienced than Mr. Harriman, could have delivered to the Securities Company $82,000,000 of property at a grossly inadequate valuation, whether relative or absolute. Irrespective of any loss of principal by delivering Northern Pacific shares at 115 as compared with Great Northern at 180, the annual return that he then consented to accept in perpetuity was, according to his present view, less by $1,000,000 than would have been his, if in November, 1901, his Northern Pacific shares had been taken in at the present ratio of 135 to 170 which he states represents also the real relative values in November, 1901. His insistence that he will not now accept distribution upon the basis of all original contributions including his own, made with precise knowledge in 1901, indicates that in the course of events values have shifted, and not that when he sold the Northern Pacific at 115 as compared with Great Northern at 180 he did not know what he was doing.

These unqualified averments of the complainants would seem to be sufficient to show that since 1901 there had been an important change and disturbance in the relative values of the railway shares, and that the complainants are endeavoring to obtain the shares which have increased, leaving to their fellow stockholders the shares which have declined in value. Certainly their contention is that, notwithstanding by common agreement all parties have sold to the Securities Company upon a common basis of relative values, that basis shall not be observed on the present distribution, but that another shall be substituted to the advantage of complainants, and correspondingly to the disadvantage of the other shareholders, in the enormous sum of $10,000,000.

We cannot really doubt that in 1901 he knew not only the cost of his Northern Pacific shares, which, as he swears, he sold without loss, but also that he knew enough not to sell those shares at $10,000,000 less than their value as compared with Great Northern shares.

In a discussion solely of equities the fact of a change in relative values must be important. Any such change would affect the interests of the several vendors of the respective shares if another vendor were permitted to withdraw the more valuable asset from the common fund. But even though in 1901 Mr. Harriman's sale to the common fund be assumed to have been for an inadequate price, the price paid him exceeded that received by the vendors of the absolute majority of Northern Pacific common stock, and it would be inequitable to permit him once more to inflict injury upon his fellow shareholders.

SECOND. The proposed ratable distribution takes nothing from complainants for the benefit of Messrs. Morgan and Hill. On the contrary, they and their immediate associates contribute to the other 2500 stockholders in the same just proportion in which it is the duty of complainants to contribute.

Besides Northern Pacific shares, the Morgan-Hill party contributed Great Northern shares at $180.

Judge THAYER found that about 300,000 Great Northern shares were so contributed by them in exchange for $54,000,000 Northern Securities shares.

As Mr. Nichols swears (R. p. 264), upon the ratable distribution, the Morgan-Hill party, would receive only $38,722,400 Northern Pacific, which is $3,000,000 less than their original holdings of common stock and $42,000,000 less than the aggregate amount of their original common stock and the convertible bonds to which they were entitled.

In the same manner, and the same ratio as the Oregon Short Line, the Morgan and Hill party will surrender their rights in Northern Pacific shares, for the common and ratable benefit of nearly 2,500 of their fellow-stockholders in the Securities Company, who will receive 842,070 shares or 55.22 per cent. of the Northern Pacific stock.

THIRD. The holders of Securities stock in an aggregate amount exceeding $200,000,000, issued and acquired subsequent to the sale by Harriman and Pierce, are entitled to the favorable consideration of this court.

The total outstanding issue of Northern Securities stock is		$395,400,000
The amount held by those referred to by Judge THAYER as being "immediately concerned in the organization of the Northern Securities Company", or by Mr. Nichols as "being consulted" (R. p. 264) was	$99,601,600	
The amount held by the complainant is	82,491,871	
		$182,093,471
So that there were issued to or acquired by parties other than any of those originally connected with the Securities Company		$213,306,529
Of these there were issued for cash		7,522,000
So that now there are outstanding		$205,784,529

which were issued to, or are held by, those to whom Judge THAYER refers as not immediately concerned in the organization of the Northern Securities Company."

The original parties were the complainants (1) and the so-called Hill-Morgan party (12), making in all 13 persons, while the total number of stockholders is 2,531 (R. p. 264), scattered over America and Europe (R. p. 268).

There have been issued 86,945 separate certificates for Securities Company stock, of which the large majority are outstanding, and there have been approximately 16,000 transfers (R. p. 266).

As to such of these transfers, as were made pending litigation (an unknown number) the contention of the complainants has been as follows:

"The transferree or assignee, however, got no more "than the original holder; his rights are no greater; "his equities are entirely through the Securities Com- "pany; his legal position is wholly derivative; his "certificate did not purport to transfer so much Great "Northern or so much Northern Pacific; he bought "into the Securities Company for better or for worse, "and his position is no better and no worse than that "of the Securities Company itself. Therefore, restor- "ation of the *status quo* does him no conceivable "wrong and violates no right."

As to these extraordinary proposition, it may be observed that:

(1) No such transferee bought into the Northern Securities Company for better or for worse any more than did Harriman and Pierce; and the position of Harriman and Pierce is no better and is no worse than that of any such transferee.

(2) The Circuit Court, in its decree, expressly recognized the rights of such persons as may now be the holders and owners of Securities stock.

(3) Until after the repudiation by the Oregon Short Line, no purchaser of Securities Company stock

had any reason to suppose that he was not thereby acquiring a ratable interest in all of the assets then in the Securities Company's treasury. The pending Government proceeding constituted no notice to any such purchasers of anything beyond the fact that the Government was seeking to destroy the power of the combination to restrain commerce between the States No such transferee was bound to assume that any judgment in such suit would affect the property interests of the stockholders. Certainly no transferee was bound to assume that the Oregon Short Line would undertake to repudiate its sale of its Northern Pacific shares, and to withdraw from the Securities Company's possession assets which for a valuable consideration it had transferred to the treasury as a common fund for the benefit of all Securities Company stockholders.

It is true that parties to an illegal contract cannot by estoppel make the contract legal. It is not true, however, that the complainants may not have estopped themselves from making use of the decree of illegality as an adjudication that the Company was merely a custodian, and was not an actual owner of the railway shares. The complainants have held the Securities Company out, and have permitted that company to hold itself out, to the world, as the owner of these assets. Every certificate issued by the company under their direction purported to be, not a certificate representing some definite thing deposited, but a certificate of joint ownership in all the assets of the company, without distinction or discrimination. This estoppel exists equally in favor of every transferee of Securities Company stock certificates, and not alone in favor of persons purchasing stock for cash.

This estoppel against complainants cannot be avoided by any contention that all purchasers of such stock certificates had notice of the fact of combination and of the law applicable thereto. Even if all such purchasers, however innocent in actual intent, did take, and now are to be deemed to have taken, the risk of a taint of illegality in the transaction, that falls far short of the assertion now made by complainants that

in fact their transfer was not what they represented it to be, but was merely a deposit in which they then retained and reserved an important interest.

FOURTH. The following table shows the profit of the complainants under the proposed plan as compared with that demanded by them:

I.

Position of complainants under our *offer*, Securities Company *offers*.		
32,070,612 Northern Pacific.		
24,638,919 Great Northern.		
These stocks are conceded now to be worth		$85,181,488
They put in		
37,023,000 Common Stock@115	$42,576,450	
41,085,000 Preferred	41,085,000	
	$83,661,450	
Premium	7,746,050	
	$91,407,500	
Less cash received	8,915,629	
		82,491,871
Complainants net profit under our *offer*		$2,689,617

II.

Position of complainants under their demand.

$71,732,062 N. P. stock worth	$96,838,284	
Less cash tendered	2,539,691	
		$94,298,593
They put in as above		82,491,871
Profit demanded by complainants		$11,806,722

For every Northern Pacific common share other than those of complainants, the Securities Company gave 115 in its own shares. No other Northern Pacific preferred stock was purchased by the Securities Company. As to all other holders of Northern Pacific preferred, that stock was the same as cash at par.

Tenth.

Whatever view be taken of other points, no principle of law or of equity can justify the injunction so far as it relates to 347,090 shares of new common stock.

First. The injunction (p. 350) ties up two several parcels of Northern Pacific common stock. The *first parcel* comprises the 370,230 shares that the Securities Company received from Harriman and Pierce, upon 18th November, 1901. The *second parcel* comprises the 347,090 shares that it received from the Northern Pacific Railway Company on 27th December, 1901.

This second parcel of 347,090 shares never belonged to, and never was in possession of, Harriman and Pierce; and no injunction should have issued in respect of it.

The particular questions concerning this second parcel were never presented, and were not considered in the Government suit.

Second. Originally, in Article IX. of their bill (p. 6; see also p. 375) the complainants asserted a right in a second parcel consisting not of 347,090 shares but of 410,850 shares of new common stock.

This claim was based upon the allegation of the bill verified by Mr. Pierce

"that at the time of such change on the 18th of November, 1901, it was *agreed between* (or 'understood and agreed by'—p. 375) said Harriman and Pierce and said defendant Northern Securities Company that the said $41,085,000 par value of said preferred stock of the said Northern Pacific Railway Company should be converted into common stock of said Northern Pacific Railway Company; that said preferred stock was subsequently and in or about the month of December, 1901, converted by said defendant, Northern Securities Company, into common stock of the Northern Pacific Railway Company of the same par value" (*i. e.*, $41,085,000).

This allegation, with a change as to the parties and as to the character of the agreement, is reiterated by Mr. Harriman in his affidavit of May 16, as follows:

"At the time I agreed with *Messrs. J. P. Morgan & Co.* to turn over the stock of the Northern Pacific Company held by the Oregon Short Line Company *it had been understood between them and myself* that *all* of the outstanding preferred stock of the Northern Pacific Company would be converted into common stock."

The allegation of the bill certainly is, and will be seen to be, in defiance of the facts.

The averment of Mr. Harriman is true only if meaning that, *as to the Northern Pacific Company, all* of its $75,000,000 preferred stock was converted into $75,000,000 of new common stock. It is grotesquely misleading, if understood as asserting that any holder of preferred stock had or acquired or exercised any right to obtain new common stock in exchange for his preferred stock. The entire history of the case, developed in transactions to which Mr. Harriman was a party, and concerning which he has testified, refutes any such suggestion and makes it impossible to believe that he ever intended to state, much less to swear, that any right of conversion was ever conceded to the holders of preferred stock. Upon the denial to the holders of preferred stock of any right to take new common stock, turned and finally rested the ultimate control of the Hill-Morgan party as determined in the courts as well as in the financial world.

The testimony on this point will repay careful consideration.

THIRD. The intention of the Hill-Morgan party to retire *all of the preferred stock* without affording holders of the preferred stock the right to participate in the new common stock, was asserted certainly as early as the spring of 1901, and at about that time it was communicated by Mr. Hill to Mr. Harriman, as appears

fully and incontrovertibly from the following averments of Mr. Harriman's affidavit in the present suit (R., p. 187) :

"In pursuance of this policy, the Oregon Short Line Company acquired about $78,108,000 par value of the capital stock of the Northern Pacific Railway Company, which had been purchased prior to May 9, 1901. Its purchases consisted of $41,085,000 par value of preferred stock and $37,023,000 par value of common stock. Such purchases constituted a clear majority of the entire authorized and outstanding issue of the capital stock of the Northern Pacific Railway Company, namely, $155,000,000 par value, divided into $75,000,000 par value of preferred stock and $80,000,000 par value of common stock, and carried the control of the company.

"VI. Subsequently, I was informed by Mr. James J. Hill that he and his associates, together with Messrs. J. P. Morgan & Co. had acquired and then held or controlled a majority of the Northern Pacific common stock, consisting of about $42,000,000 par value thereof, and that *it was intended to retire the preferred stock of the Northern Pacific Company and convert it into common stock without affording the holders of the preferred stock the right to participate in any new securities that might be issued.* This statement of Mr. Hill was confirmed by members of the firm of J. P. Morgan & Co. *The result of such a plan, if consummated, would be to deprive the Oregon Short Line Company of its majority holding of the stock of the Northern Pacific Company and the control which such holding would represent.* The plan as outlined was to retire the existing preferred stock by means of certificates convertible into common stock, to be offered for subscription solely to the holders of existing common stock at the rate of seventy-five eightieths (75-80ths) of their holdings. At that time, and during the entire year of 1901, Mr. Hill and his associates, together with Messrs. Morgan & Co., controlled the board of directors of the Northern Pacific Company, and a majority of such board were their nominees and appointed in their interest. After such proposed conversion, Messrs. Hill and Morgan and their associates would hold in one combination of men acting together a majority of the stock of the Northern Pacific Company."

See, also, Record, pp. 236–239.

The intention thus announced to Mr. Harriman early in 1901 was carried into effect November 13, 1901, at the 83rd meeting of the directors of the Northern Pacific Railway Company, at which Mr. Harriman was present, being then elected a member of the Executive Committee (R. p. 281).

At this meeting were adopted by unanimous vote (including that of Mr. Harriman), the resolutions for the retirement of the preferred stock and the notice thereof to be given to the holders of preferred stock. These resolutions are fully set forth in the record (p. 282–287). Subsequent proceedings for such conversion were taken by the Executive Committee upon November 15 and 18, 1901 (R. p. 287–296). In these proceedings by the Executive Committee, Mr. Harriman participated. At the meeting on Monday, November 18, at two o'clock P. M., it was voted to offer to every holder of common stock the opportunity to purchase at par, to an amount equal to seventy-five eightieths of the par amount of his common stock, certificates of indebtedness of the Northern Pacific Railway Company (part of the total issue of $75,000,000) convertible into shares of the common stock of the Northern Pacific Railway Company at the rate of one share of $100 par value for each $100 of the principal of such convertible certificates remaining unpaid at the date of such conversion (R. p. 293-296).

It is worthy of notice that this decisive action had been taken with Mr. Harriman's participation at or *prior* to November 18, 1901, the date of his sale of the Northern Pacific shares now in question. This being the case, it is difficult to understand, as a statement of fact, the averments of Article IX. of the bill of complaint (R. p. 6; also p. 375) that *at the time of such exchange* on said 18th of November, 1901, it was "agreed between", or that it was "understood and agreed by", said Harriman and Pierce and said Northern Securities Company that the said $41,085,000 par value of said preferred stock of the said Northern Pacific Railway Company should be

converted into the common stock of the Northern Pacific Railway Company.

Five days prior to that date, Mr. Harriman had voted that no preferred stockholder should have a right of conversion, and upon this very 18th day of November he had voted to offer to common stockholders the exclusive right to take the new common stock. The completeness of Mr. Harriman's understanding that no preferred stockholder would have the right to convert, but that all right to the new common stock would be lodged in the holders of the old common stock, is further shown by Mr. Harriman's other averments in his same affidavit (R. p. 158). On November 18, 1901, Messrs. J. P. Morgan & Co. notified him to deliver the Northern Pacific stock to the Northern Securities Company, and informed him that such company would close the transaction, and that they would receive from it the stock and cash payments agreed upon, which agreement was carried out.

The terms of the agreement and the inducement thereto are stated by Mr. Harriman as follows (R. p. 155, 157–158):

"I was then urged by Messrs. Morgan & Co. to dispose of the Northern Pacific stock held by the Oregon Short Line Company on the ground that it would be a minority holding under the plan of conversion if consummated, that the majority would be held by the holding company, and that there would probably be no market for any such minority holding. They further stated that upon the organization of the proposed holding company, they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line and to pay therefor in the stock of the holding company at the rate of 115 for all our stock, which would be the rate at which the holding company would take in the common stock held by them and Mr. Hill and his associates, and all other parties, and they thereupon offered me those terms. I took the matter under consideration and conferred with members of the board of directors of the Oregon Short Line Company. *The conversion under conditions reducing the Oregon Short Line holdings to a minority*

was then a foregone conclusion unless we were prepared to commence litigation, which would be protracted and which would probably be detrimental to the value of all railroad securities in view of the condition of the financial markets resulting from the panic of May 9, 1901. The alternative of not accepting shares of the holding company, but holding the minority interest in the Northern Pacific Company, involved serious risks of great loss, as it would then be to the interest of the holding company to sacrifice the Northern Pacific for the benefit of the Great Northern Company. It was, therefore, finally agreed with Messrs. J. P. Morgan & Co. that the Oregon Short Line Company would turn over its entire holdings of Northern Pacific stock for $82,491,871 par value of the stock of the holding company and $8,915,629 in cash."

In the suit of the State of Minnesota, Mr. Harriman gave the following testimony, which by stipulation became part of the evidence in the Government suit. (R. p. 239):

"Q. Did you finally consent to surrender your holdings on the basis on which you did because you had made up your mind they would carry out the determination you had heard expressed, to retire the preferred stock, and thus take away from you the controlling interest in the stock of the Northern Pacific?

"A. I think I recollect pretty clearly that from our standpoint we thought it was better to accept that price for our stock than to go into a legal contest.

"Q. And you understood that if you did not do that you would have a legal contest on that question?

"A. Well, we took it for granted, naturally, action having been taken determining to retire the preferred stock.

"Q. Well, action was not taken to retire the preferred stock until your negotiations had nearly reached a conclusion?

"A. Yes, but they had not reached a conclusion.

"Q. That is, you waited until the very last moment to see if they would do what you understood they would do?

"A. Well, we were very patient."

The conditions thus presented by Mr. Harriman himself, showing his early and perfect familiarity

with the whole plan for the retirement of the preferred stock for the benefit of the common stock; the offer to purchase the Oregon Short Line holdings of Northern Pacific stock "and to pay therefor in the stock of the holding company *at the rate of 115 for all of our stock*"; and the recognition of himself and of the Oregon Short Line directors that "*the conversion under conditions reducing the Ore-*" *gon Short Line holdings to a minority was then a fore-*" *gone conclusion unless we were prepared to commence* " *litigation which would be protracted*"—these conditions, we repeat, are wholly inconsistent with any understanding or agreement then or thereafter on the part of J. P. Morgan & Co. or of the Securities Company that the outstanding preferred stock of the Northern Pacific Company, or even the portion of it held by the Oregon Short Line Company, would be converted into common stock.

If it had been agreed that the Harriman and Pierce stock was to be converted for their benefit, then the Oregon Short Line directors would not have been contemplating themselves as occupying the dreaded position of a minority stockholder of the Northern Pacific Company. On the other hand, by an outright sale to the Northern Securities Company, they would divest themselves of all interest, either legal or financial, in any use by the Securities Company of the stock so sold. Because they wished to be neither in the minority, nor in litigation, they concluded to make an outright sale, and therefore they had no reason to make any stipulation as to the way in which the buyer should use the stock.

The alleged agreement to convert the preferred stock into common stock is further negatived by the resolutions of the Securities Company directors (adopted with Mr. Harriman's knowledge upon November 18, 1901,) pursuant to which the Harriman and Pierce stock was acquired. Mr. Hill testifies (R. p. 271) that "no other or additional contract, agreement or " understanding, relative to the acquisition of such

" shares by the Northern Securities Company, than is " expressed in such resolution, was ever made or " authorized by said Company."

Mr. Hill's denial of the agreement is supported by the circumstances. Mr. Harriman states that Morgan & Co.'s offer of 115 for *all of the* Oregon Short Line holdings amounted to $89,824,208 in Northern Securities stock. The price actually paid was $91,407,500 (in Securities stock $82,491,871 and in cash $8,915,629). Thus there was actually paid to Harriman and Pierce a price which by the sum of $1,583,292 exceeded the total value of all of the holdings of the Oregon Short Line Company at 115, even though all of those holdings had been common stock. The payment of a sum exceeding the stipulated value of all of the stock, even though the preferred were considered as though converted into common stock, excludes the possibility that there was an agreement by the buyer for the benefit of the vendor that it would convert into common stock the preferred stock thus bought and paid for.

This conclusion is fortified by a consideration of the legal situation. In their brief filed January 23 in support of the petition for writ of *certiorari*, the petitioners' counsel quoted a statement of Judge Hook in the opinion delivered by him for the Circuit Court of Appeals in *Weidenfeld v. Northern Pacific Ry. Co.* (129 Fed Rep., 305, 309), as though he had held that the preferred stock had been converted into the common stock of the Company. This opinion, however, was announced in the suit brought *by a holder of common stock* disputing the right of the Northern Pacific Company *as a corporation* either to retire or to convert its preferred stock. In such case Judge Hook affirmed *the right of the Company* to retire or to convert all of its preferred stock by means of an issue of an equal amount of new common stock. He did not undertake to pass upon questions as between the two

classes of stockholders. *Weidenfeld's case involved no consideration or decision of any right of a preferred stockholder.*

As was observed by Judge HOOK:

"It is true that the preferred stockholders were not "accorded the privilege of subscribing to the new issue "of common stock; but certainly that fact is not a "proper subject for complaint on the part of the ap- "pellant. His holdings were confined to 100 shares "of common stock. He is not the protector or the "conservator of the personal rights of the preferred "stockholders. The claim that their rights were de- "nied may well be left to them to be asserted" (129 Fed. 309).

The question as to *the right of the preferred stockholder* was fiercely asserted and was firmly decided in the Supreme Court of the State of New York in the case of *Hackett v. Northern Pacific Ry. Co.* (36 Misc. Rep. 593). The luminous and convincing opinion of Mr. Justice SCOTT is printed in the Appendix (p. 376). The soundness of his decision that a preferred stockholder had no right to new common stock was everywhere recognized. Until the filing of the amended bill in the present case, no other holder of preferred stock has pretended to assert such a right.

The preferred stock turned over by Harriman and Pierce, was actually retired, and was satisfied on January 2, 1902, as is shown by the affidavit of Mr. Nichols (R. p. 265) and by that of Mr. Mahl, Comptroller of the Oregon Short Line (R. p. 176–182). Mr. Harriman's averment that the facts stated in Mr. Mahl's affidavit had come to his knowledge only a few days preceding May 16, 1904, is without apparent purpose unless it be to relieve himself of the constructive notice of entries in the Securities Company's books, which otherwise might be imputed to him as a member of the Executive Committee of that Company.

Upon this incontestible showing, it is impossible to believe that there was ever any agreement that the preferred stock sold by the Oregon Short Line should be converted into common stock.

FOURTH. The facts already considered show that upon December 27, 1901, as holder of 370,230 shares of common stock acquired from Harriman and Pierce, and in an amount equal to seventy-five eightieths thereof, the Securities Company subscribed for 347,090 shares of the new common stock. This new common stock was paid for by a cheque of the Securities Company upon its bankers J. P. Morgan & Co. for $34,709,062.50, and upon the same day the Northern Securities Company received from the Northern Pacific Railway Company the cheque of that Company, upon the same bankers, for $34,709,000.

This transaction having been criticised by the complainants as a mere exchange of cheques, it is well in this place to observe that the entire transaction involved an actual expenditure by the Securities Company of its own cash to the extent of $2,519,618.50, as follows:

CASH PAYMENTS BY SECURITIES COMPANY

For new common stock	$34,709,062.50
To Harriman and Pierce	8,915,629.00
Total	$43,624,684.50

CASH RECEIPTS BY SECURITIES COMPANY

For par proceeds of preferred stock	41,085,000.00.
Excess of cash payments by Securities Company	$2,519,684.50)

FIFTH. It remains now to consider whether the complainants have any claim in respect of such new common stock received by the Securities Company, not in exchange for preferred stock, but in the exercise of its right of subscription in respect of the common stock by it received from Harriman and Pierce.

Of course the pretense of any stipulation by the purchaser as to the way in which it should use the stock, that it had purchased and had paid for, is as incredible

with reference to the purchase of new common stock, as already we have seen it to be with reference to a conversion of the preferred stock.

But there are additional and cogent reasons compelling the rejection of the suggestion that such a stipulation was in fact made, even though it might have been made by parties not competent in business.

In his testimony again and again quoted in this brief Mr. Harriman declares that no conditions were attached to the sale, and so does Mr. Hill (R. p. 271).

The assertion in the bill of complaint is that there was an agreement that the preferred stock should be converted into common stock. This assertion, though ill founded, is not equivalent to, but excludes, an assertion that the contention there was a very different agreement, viz., that for the benefit of Harriman and Pierce, the Northern Securities Company would exercise its subscription rights to an amount equal to seventy-five eightieths of the common stock purchased from them.

There being, then, no express agreement which would entitle the complainants to the new common stock, they cannot maintain a right thereto upon the theory that such new common stock was an automatic increase or outgrowth of the old common stock transferred by them. The new common stock was not a natural increase of the old common stock, as in the case of a mare with foal or a cow with calf. The mere reception of the old common stock and of the preferred stock by the Securities Company, in and of itself would not have resulted in its reception of the new stock. To procure such new common stock, the Securities Company was obliged to exercise its judgment, to incur risk, and to use a large sum of its own cash or cash assets.

As already shown, exclusive of the Harriman and Pierce preferred stock, the Northern Securi-

ties Company had become possessed of an absolute majority of the total capital stock of the Northern Pacific Railway Company. Therefore, for any purpose of control, the acquisition of more new common stock was wholly unnecessary. The $41,085,000 cash that the Securities Company received upon the retirement of the preferred stock, was available for any of its corporate purposes. It might well be that in view of its existing control of the Northern Pacific, it might choose to use this vast sum for the purchase of other and independent properties, such as its certificate of incorporation authorized it to hold. It did choose to apply these many millions to the purchase of new common stock of the Northern Pacific, not because of any necessity or obligation to make such purchase, but because in the exercise of their own judgment the managers of the Securitie sCompany deemed that such purchase would be wise. The risk of this purchase was altogether that of the Securities Company; for if within the year 1902 the Northern Pacific stock had declined to the low price at which it was selling in 1900, an enormous loss would have fallen upon the Securities Company and not upon the complainants.

Furthermore, as already we have seen, the procurement of this new common stock involved an expenditure by the Securities Company of its own cash or cash assets to the amount of $2,519,684.56 in excess of its net cash receipts from or on account of this transaction.

Such expenditure, and the important elements of judgment and risk, interpose themselves as an insuperable obstacle to any contention that the acquisition of this new common stock was a mere incident to, or was an issue out of, property received by the Securities Company from Harriman and Pierce.

Thus it appears that the complainants are not entitled to this new common stock either upon the theory that in equity the complainants are entitled to

follow the proceeds of stock delivered to the Securities Company, or upon the theory of an agreement—for none existed.

If the complainants' claim to this new common stock be based upon a theory that the Securities Company was a mere custodian of the shares received by it, the answer is that this new common stock did not come into existence until after the sale by the complainants, who of course never held the same or any title thereto. The only relief open to complainants would be a suit in equity to follow the Securities Company's exercise of its optional right, and to endeavor to impress the result thereof with a trust in their favor. To the establishment of any such right a decree of a court of equity would be a pre-requisite, for they would be demanding the conveyance of a title not yet vested in them. To such relief, there would be two absolutely sufficient answers. The first would be that no court of equity would undertake to enforce a trust growing out of an illegal agreement by the complainants relying thereon. The second, would be that, in part at least, the new stock was the result of the Securities Company's use of its own cash or cash assets in the exercise of its own discretion and at its own risk. Such an purchase could not be charged against the Securities Company as an acquisition in trust. No trustee is bound to use his own means for the benefit of a trust estate.

Upon these propositions, the opinion in the *Pullman Central* Case (171 U. S., 138, 159) is decisive. Concerning the right of the claim to new contracts, or to earnings resulting from its use of the property under the illegal lease, Mr. Justice PECKHAM stated the ruling of this Court as follows (*Appendix*, p. 327):

"What other contracts may have been made by the Pullman Company with railroad companies would form no factor in the value of the contracts assigned. If others were obtained, they had never been the property of the Central Company, and the latter could only make a pretense of a claim in regard to them by virtue of and through the illegal contract. A resort to the

illegal instrument cannot be permitted for the purpose of sustaining any recovery. * * * * * *

"The contracts and the patents must be eliminated from the value of the property.

"Nor can we accede to the view that the Pullman Company is liable for the earnings of the property which it realized by means of putting such property to the very use which the lease provided. It had the right while both parties acquiesced to so use the property.

"There is no question of trustee in the case. *Root v. Railway Company*, 105 U. S. 189, 215.

"The property was placed in its hands by the lessor and in accordance with the terms of the agreement. It was not then impressed with any trust according to any definition of that term known to us. Although the title did not pass and was not intended to pass, the lessee did nothing with the property other than was justified by the lease. His liability is based only upon an implied promise to return or make compensation therefor. This implication of a promise would not arise until one or the other party chose to terminate the lease, for the law implies such promise in order only that justice, so far as possible, may be done. So long as neither party takes any objection to the agreement, and both carry it out, there is no room for any differences, and no promise to return the property or make compensation is necessary, and none is therefore implied. The use of the property is lawful as between the parties, so long as the lease was not repudiated by either, and the rent compensates for the use. After the repudiation the promise is then implied and it is fulfilled by the payment of the value of the property at the time the promise is implied and interest thereon from that time.

"As to the claim of the lessor that its business has been broken up, its contracts with railroads termimated and the corporation left in a condition of inability to again take up its former plans, and that all this should be regarded in the measure of the relief to which it should be entitled, the same considerations which we have already adverted to must be entertained. These are results of the illegality of the contract entered into between these parties, and its subsequent repudiation on that ground, and in regard to such illegality the Central Company is certainly as much in the wrong as the cross-defendant herein. The former knew the extent of its obligations under its charter as well as

the latter did, and the illegal provisions of the lease were quite as much its doings as they were those of the cross-defendant. To grant relief based upon these facts would be so clearly to grant relief to one of the parties to an illegal contract, based upon the contract itself or upon alleged damages arising out of its non-fulfillment, that nothing more need be said upon that branch of the subject. It is emphatically an application of the rule that in such a case the position of the defendant is the better.

"We conclude that the cross-defendant is not liable for the contracts and patents transferred nor for the possible damage the Central Company may have sustained, as above stated."

On the other hand, if the complainants were to claim a right to this new common stock on the basis of an express agreement (though, as we have seen, there was no express agreement), the mere assertion by the complainants of a stipulation as a part of an agreement generally illegal, and their attempt to enforce the same, would be not only futile in itself, but its mere assertion would validate their prayer for the relief, if any, to which otherwise they might be entitled. The rule is thus stated in Story's Equity Jurisprudence (13 ed. vol. 2; p. 301; *Appendix* p. 371).

296*a*. But where a party to an illegal or immoral contract comes himself to be relieved from that contract or its obligations, he must distinctly and exclusively state such grounds of relief as the court can legally attend to; *and he must not accompany his claim to relief, which may be legitimate, with other claims and complaints which are contaminated with the original immoral purpose; for if he sets up as a ground of relief the non-fulfillment of the illegal contract on the other side, and thereby that he is released from his obligation to perform it, that shows that he still relies upon the immoral contract and its terms for relief, and therefore the court will refuse it.* (See also *McMullen* v. *Hoffman*, *Appendix*, pp. 330, 340; *Trist* v. *Child*, 21 Wall. 441–8).

In closing, it may be observed that upon the record, and conceding to the complainants every one of their claims excepting the alleged and disputed right in respect of the preferred stock, all that they could recover would be $37,023,000 common stock, and $41,085,000 cash to represent the value of the preferred stock, which was a cash asset at par at the time when they sold it. They would have to give credit for the $8,915,629 cash that they received, interest and dividends being properly adjusted. It is impossible that any court should undertake to work out for the benefit of the complainants an agreement which they have repudiated as illegal.

However, all of the complainants' claim lacks equity and it should be denied *in toto*.

Eleventh.

The decree of the Circuit Court of Appeals was right, and should be affirmed with costs.

20 February, 1905.

ELIHU ROOT,
FRANCIS LYNDE STETSON,
Of Counsel for Respondents.

United States

[redacted]

vs.

[redacted]

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY AND THE EQUITABLE TRUST COMPANY OF NEW YORK,

[redacted]

vs.

NORTHERN SECURITIES COMPANY,

[redacted]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

AUTHORITIES.

APPENDIX TO BRIEF OF MR. ROOT AND MR. PIERSON.

ELIHU ROOT,
FRANCIS LYNDE STETSON,
[redacted]

Washington, 20 February, 1903.

S. S. Shannon, Printer and Book Binder, N. Y.

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IV. In all such cases the defendant's possession is a sufficient answer to the plaintiff's demand; both (*a*) because such possession stands as the equivalent of a title in the defendant, and (*b*) because to discourage such transactions, courts will be deaf to the clamor of a complainant in pari delicto.

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V. The condition of the possessor is so much better than that even of the original owner, that the possessor can recover the property not only from a stranger but from such original owner, if by chance the latter has been able to repossess himself of the property.

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VII. The doctrine of locus poenitentiae is available only to those who seasonably seek to make restitution and to withdraw from their illegal executory contract. Laches is a fatal vice.

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VIII. The rigor of the rule against the complainant is never relaxed out of consideration for him, but only when necessary to promote equity and justice.

Pullman Co. v. Central Co. (171 U. S. 138), 307, 319
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IX. In cases presenting no such special considerations of equity, justice or public policy, a party even to an unexecuted illegal contract cannot recover back money paid or property delivered thereunder.

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NORTHERN PACIFIC PREFERRED STOCK RETIREMENT.

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APPLICATION OF AUTHORITIES TO THE CASE AT BAR.

I.

Evidence of ownership.

Everything in the record, by mere recital and without argument, shows that in fact and by intent of both parties, there was a sale of the Northern Pacific stock to the Securities Company in consideration of a stockholder's interest in that company, and a large sum of money—i. e. the issue to Harriman and Pierce of 824,918 shares of the stock and the payment to them of $8,915,629 in cash.

II.

Estoppel against asserting custodianship.

The complainants are estopped from asserting that the Securities Company is a trustee or bailee. They have publicly held out the Securities Company to be the owner of the railway stocks, and have induced innocent third persons to acquire interests in the corporation in reliance thereupon.

"In *Union Trust Co. v. Illinois Midland Co.*, "117 U. S. 434, after one railroad corporation had "purchased of two others their connecting rail- "roads and their franchises, a receiver had been "appointed of all its property, including the three "railroads, and, under the direction of the court, "and *without objection by any of the parties inter- "ested, had for years administered the whole as a "unit, and incurred expenses and issued certificates "accordingly.* It was held that the *holders of*

Estoppel against asserting custodianship.

" *bonds secured by mortgage of one of the purchased* " *railroads could not, for want of affirmative legis-* " *lative authority for the sale and purchase of that* " *road, claim a priority of lien upon it as against* " *the holders of certificates issued by the receiver for* " *necessary and proper expenses for the whole line;* " and this court, as declared in its opinion de- " livered by Mr. Justice BLATCHFORD, rested this " conclusion ' on the principle that *nonaction on* " *the part of the bondholders* and their trustee " which allowed the court and the receivers to go " on during the entire litigation contracting debts " in respect to the whole line operated as a unit, " and administering the property as one, under " circumstances where, as shown, it was and is im- " possible to separate the interests, as to expendi- " tures and benefits, in respect to the matters now " questioned, and where important rights have ac- " crued on the faith of the unity of the interests, " *amounts to such acquiescence as should operate as* " *an estoppel* ' (117 U. S. 467–469). * * * *

" This distinction is clearly brought out in " *Pennsylvania Railroad v. St. Louis, &c., Rail-* " *road*, above cited, in which it was argued, sub- " stantially as in the present case, that, although " the contract of lease might be void, so that no " action could originally have been maintained " upon it, yet there had been for years *such per-* " *formance of it, in the use, possession and control* " *by the defendants of the plaintiff's road and fran-* " *chise that they could not now be permitted to re-* " *pudiate or abandon it;* and that the case came " *within that class in which it had been held that,* " *where a contract has been so far executed that* " *property has passed and rights have been acquired* " *under it, the courts will not disturb the possession* " *of such property, or compel restitution of money* " *received under such contract.* In answering that " objection, Mr. Justice MILLER, speaking for the " court, said : ' Undoubtedly there are *such decisions* " *in courts of high authority and there is such a* " *principle* very sound in its application to appro- " priate cases." **Central Co. v. Pullman Co.,** *(post,* pp. **279, 300–1.**)

" The property in controversy having been trans- " ferred to the son, to be held and treated by him as " its ostensible owner, to accomplish a purpose pro- " hibited by law, the father lost the right to reclaim it

" by law. It could have been used by the son for his own " purposes." **McIntosh v. Wilson** *(post* p. **63**).

Estoppel against asserting custodianship.

One who takes a promissory note, *bearing date of a secular day*, before maturity, in good faith and for a valuable consideration, may maintain an action thereon, against the maker, *although the note was in fact so made on the Lord's day that no action could be maintained on it by the original payee.* **Cranson v. Goss,** *post* pp. **92, 94.**

III.

But whether the Securities Company be a vendee or a custodian, the complainants are not entitled to recover the Northern Pacific stock. The transaction was in contravention of public policy and a penal statute, and their demand for the return of the stock by them delivered for such illegal purpose, is barred by the rule In pari delicto potior est conditio defendentis et possidentis.

Whether vendee or custodian, maxim applies.

First. The complainants cannot avoid the bar of the rule, if the Securities Company be regarded as vendee.

Securities Co. as vendee.

1. The complainants and the Securities Company are in pari delicto.

In **Irwin v. Curie** *(post* p. **227**), expounding **Leonard v. Poole** *(post* p. **224**),—an action for accounting between parties to a combination to advance the price of lard—PARKER, C. J., declared that " the persons interested in those transactions were all " of them, under the statutes of this state, engaged in " a conspiracy to commit an act injurious to trade or " commerce, and the contract under which they were " proceeding was *malum in se.*"

In pari delicto.

As vendee.—*In pari delicto.*

In **White v. Hunter** *(post* p. **128**), it was held to be a well-settled rule of law that as to all "*acts* "*and contracts which are unlawful because hostile to* "*public policy, the parties thereto are regarded as being* "*in pari delicto.*"

In **Inhabitants v. Eaton** *(post* p. **68**), the Court, after referring to the several classes of transactions in which the parties are considered not *in pari delicto*, proceeds further to declare "that in all "acts which are unlawful on account of their immor- "ality, *or because they are hostile to public policy, there* "*the parties to the act are in pari delicto.*"

See, also, the numerous decisions printed in full or summarized in this Appendix, wherein the parties were held to be *in pari delicto.*

As vendee.—Contract executed.

2. The complainants transferred property to the Securities Company for a purpose forbidden by law, and in exchange received shares of stock and cash. The illegal contract has been executed in full, or in any event to such a degree as to bar this suit for its rescission and the recovery of the property transferred.

No recovery because of continuing corporate contract.

(**A**) It is executed to such a degree as to bar rescission, even though the contractual obligations of the corporation to its stockholders be regarded as continuing.

In the **Vandalia case** (*post* p. **265**) the complainant, at the time of the suit, had received only 17 of the 999 yearly payments to be made in consideration of its *ultra vires* lease to the defendant; but the Court regarded the illegal contract of lease as so far executed that the lessor could not be heard to assert its illegality or to rescind its lease.

In **McIntosh v. Wilson** *(post* p. **63**), the plaintiff for an illegal purpose, placed property in the hands of his son, to be held by him "*as ostensible owner*" *for an indefinite period*, the profits to be paid to the plaintiff: it was held that the plaintiff had lost the right to reclaim the property by law.

In **Kearley v. Thomson** *(post* p. **19**), the contract was performed as to the first stipulation *(i. e.,* that the defendants should not appear at the public examination of the bankrupt), but was unperformed as to the second stipulation *(i. e.,* that they should not appear at the application for discharge), no application for discharge having been made at the time of suit. It was held that money paid on the illegal contract could not be recovered. As vendee.—No recovery because of continuing corporate contract.

In **White v. Hunter** *(post* p. **128**), the object and purpose of the conveyance was to provide for the support of the grantor and the grantee *during their lives*, and it was held that as the consideration was an immoral one, the *grantor after the transfer could not have maintained an action to recover possession of the land*, and therefore his heir (the plaintiff) could not.

In **Miller v. Larson** (19 Wis. 463), the defense in ejectment was that defendant was in possession of land in pursuance of an agreement by which he had advanced money to carry on a lawsuit for plaintiff, which agreement was champertous and illegal. There was evidence, which was relied on by the plaintiff, showing that *the illegal agreement had not been fully performed at the time of suit.* The decision was that the plaintiff could not succeed in his action. The Court said: "The contract has already been executed; "*if not wholly, at least partially, by both parties* * * * "*If it has been partially executed, and money or labor* "*expended on one side and land and property delivered* "*on the other, in part performance of it, as to such part* "*performance the condition of the parties is the same* "*as if it had been fully performed.*"

Martin v. Wade (37 Cal. 168) was an action for the recovery of money (represented by a promissory note) advanced to a candidate for public office, in consideration for his promise to share with the lender the emoluments of the office. The opinion recites "that the plaintiff's position is that the *contract having been rescinded and annulled before performance*, Wiley (the plaintiff's assignor) was entitled to recover the money he had paid on the contract." The Court decided that *whether a contract against public policy was executory or executed, no action could be brought either* on the contract, *or to recover back the consideration*, or to recover judgment on a promissory note made in consideration of the cancellation of such contract; and furthermore that there *could be no liability or implied promise to repay the money advanced under the contract.*

To the same effect are the many cases of transfers in composition of felonies, etc., where in its very nature the consideration is continuing. See **Inhabitants v. Eaton** *(post* p. **68**); **Atwood v. Fisk** *(post* p. **84**); **Traders Bank v. Steere** *(post* p. **98**); **Adams v. Barrett** (5 Ga. 405); **Rock v. Mathews** (35 W. Va. 531 : 14 S. E., 137).

See also **Ward v. Hartley** (78 S. W. 302).

As vendee. No recovery because of Government's decree.

(**B**) It is executed to such a degree as to bar rescission, even though the decree in the Government suit prevents the corporation from collecting moneys applicable to the payment of dividends to its stockholders.

In **McIntosh v. Wilson** *(post,* p. **63**), the object of the contract—*i. e.*, the enabling of the plaintiff to conduct a pharmacy without a license by keeping his son in possession as *ostensible owner*—failed because of the seizure of the property by creditors of the son. The Court held that by the transfer, the *plaintiff lost the right to recover the property by law,* and *it could have been used by the son for the payment of his debts, and therefore was subject to legal process in favor of the son's creditors.*

In Re Great Berlin Steamboat Co., *(post* p. **8**), the Court pointed out that any further performance of the illegal purpose had been made impossible by the court order for the compulsory winding up of the Company.

In **Shattuck v. Watson** (53 Ark. 147 : 13 S. W. 516) involved the composition of a felony. After the criminal had been prosecuted *through other agencies,* one of the parties sought to disaffirm the contract and to recover back the securities given in consideration for the composition. It was decided that the law would lend no aid to either party to the illegality.

Compton v. Bunker Hill Bank (96 Ill. 301 : 36 Am. Rep. 147) was a suit to set aside a deed. Quoting from the opinion,—"The gist of appellant's "case is that her deed was executed in consideration "of an agreement to compound a criminal offense, "which is in contravention of law, and *she has not "realized therefrom the result that she anticipated.*" The Court *held* that the *contract was executed,* and would not lend its aid to cancel the instrument.

(**C**) It is executed to such a degree as to bar rescission, even if the proposed *pro rata* distribution of corporate assets would violate some term of the contract between the corporation and the complainants, which, in fact, it would not.

As vendee.—No recovery because of proposed distribution.

In **Bruer v. Kansas M. I. Co.** (*post*, p. **112**), the defendant assented to an illegal assignment to Bruer of a policy of life insurance, and received premiums from him, and thereafter denied liability on the policy to Bruer, who brought suit to recover the premiums. It was held that Bruer could not recover.

In **Hooker v. DePalos** (28 Ohio St. 251) defendants in error sued to recover $500 paid by them to plaintiffs in error, on account of the purchase price named in a contract for the sale of lands to constitute prizes in a lottery scheme, to be set on foot by the vendees, which was held to be illegal as against public policy and as contrary to the provisions of a penal statute. The scheme proving a failure financially, and the plaintiffs below finding themselves in danger of indictment, they defaulted the subsequent payments, disaffirmed the contract and brought this suit. It was *held* that the vendee could not maintain the action to recover from the vendor the $500 paid on the contract, the Court being of opinion (to quote from the syllabus of the report) that "when a contract "has been *partially performed by both parties*, "*so that the evil purpose of the contract has* "*been in part effected by the co-operation of* "*both parties, as where the vendor has withdrawn* "*the land from the market, and for some months* "*subjected it to the control of the vendee for the pur-*"*poses of the lottery*, and the vendee has paid part of "the purchase money *and has with the aid of the* "*vendor, set the enterprise on foot, and issued and sold* "*a number of lottery tickets*, then, *as to such part per-*"*formance the condition of the parties is the same as* "*though the contract had been fully executed.* The par-"ties are *in pari delicto*, and the law will aid NEITHER "OF THEM in enforcing further performance, or in "undoing what has been unlawfully done."

In **Scott v. Brown** (*post* p. **26**), the plaintiff sued to recover money given to a broker to be used in purchases of stock at a fictitious premium in the open market, the object being to defraud prospective purchasers. *The broker wholly failed to perform the*

As vendee.—No recovery because of proposed distribution.

agreement, retaining the money himself and delivering his own shares. It was held that the money could not be recovered back.

In **Markley v. Village** (*post* p. **229**) the Court declined to allow a rescission of a conveyance of land made by a village to induce a corporation to establish a manufactory, *although the corporation had wholly failed to perform its agreement.*

In **Thompson v. Williams** (*post* p. **136**) the plaintiff unsuccessfully sought to recover the agreed price of cattle by him sold on Sunday to defendant, who, it appears, previously had obtained judgment against plaintiff for trespass in retaking the cattle, *although no part of the purchase price had been paid.* See also **Kinney v. McDermott** (*post* p. **60**); **Smith v. Bean** (*post* p. **125**).

In **Cohn v. Heimbauch** (*post* p. **241**), a horse had been sold on Sunday (which was illegal), and after delivery to the vendee, had been taken into the possession of the vendor. The vendee sued in replevin for recovery, and obtained judgment, *although the purchase price had not been paid.*

In **Liness v. Hesing** (44 Ill. 113 : 92 Am. Dec 153), it appeared that the plaintiff had sent $20 to the defendant, with the object of inducing the latter to use his influence to get the former nominated for an office, without reference to the fitness of the applicant for the position or the public good, and had promised $20 more if the appointment were secured; that the *defendant received the money, and had used his influence not for the plaintiff, but against him;* and that this suit had been begun by the plaintiff for the recovery of the $20 paid. Whereupon it was held that the transaction on the part of the plaintiff was of such an improper character that the law would not afford him any remedy to recover back the payment.

Black v. Oliver (1 Ala. 449 : 35 Am. Dec. 38) was an action of detinue for the recovery of a negro slave. The evidence showed that the slave in controversy was sold by the defendant in error at a very reduced price to one Sweet, in consideration that he should make her his wife (which was illegal) and emancipate her, and that the condition had not been performed. It was held that the condition subsequent was illegal and void; that the contract of sale was executed in all other respects, and that the court would not interfere in favor of either party.

St. L. R. Co. v. Mathers, 104 Ill. 259. **Same v. Same** (71 Ill. 592; 22 Am. Rep. 122). The mate-

rial facts were as follows: Mathers had conveyed real estate to a railroad company (afterwards consolidated into the St. L. J. & Chi. R. R. Co.) by a trust deed, providing for defeasance in case the company established a depot or station within three miles of a particular point. The *company had established a station within three miles of the designated point and the grantor sought to recover back the land.* The Court held that the condition or agreement was illegal, and that a *reconveyance of the property could not be decreed on account of non-performance by the railroad company*—declaring that where real estate has been conveyed for the *express purpose of doing that which was illegal, a court of equity will not in general interfere*, but will leave the title to the property where the parties have placed it.

As vendee.—No recovery because of proposed distribution.

In **Patterson v. Donner** (48 Cal. 369), the decision is based on the proposition that if a grantee, at the time a deed is given, executes to the grantor a writing stating that if the grantee shall not procure two witnesses to testify to a certain state of facts, "the deed shall be null and void", and also stating that if the grantee shall procure such witnesses then the deed shall take effect as a mortgage, the transaction constitutes a *conveyance of the legal title with an unlawful condition subsequent*, and *the legal title would not become divested by failure to perform the illegal stipulation*, and one who *places the legal title to land in another upon an unlawful condition subsequent cannot recover it by suit at law or in equity.*

Second. Neither can the complainants avoid the operation of the rule by treating the Securities Company merely as custodian, to hold a deposited stock, to collect dividends, &c.

As Custodian.—Maxim applies.

1. The Securities Company is in pari delicto with the complainants. It was an active party to the illegality.

In pari delicto.

In **Leonard v. Poole** (*post* p. **224**),—an action for accounting between parties to a combination to advance the price of lard—the defendant, a participating broker, was held to be *in pari delicto* with his principals.

As Custodian.—*In pari delicto.*

In **Harse v. Pearl L. A. Co.** *(post* p. **35**), it appeared that, relying upon representations made by the insurance agent that a policy upon the life of his mother would be valid (such representations being made by the agent in good faith), the plaintiff, took out such policy and paid premiums thereon. The insurance being illegal, the plaintiff sued to recover the premiums paid by him. It was held that the parties were *in pari delicto*, and the premiums could not be recovered back.

In **Gibbs v. Gas Co.** *(post* p. **262**), a promoter suing for compensation for bringing about an illegal combination, was held to be *in pari delicto* with the principals.

In **Herman v. Jeuchner** *(post* p. **14**), a custodian of money deposited to indemnify him against loss on a bail bond, was held to be *in pari delicto* with the depositor.

In **Equitable Society v. Wetherill** *(post* p. **359**), an insurance broker who in violation of statute paid to the company a premium due from a policy holder, was not allowed to recover from the policy holder.

In **McIntosh v. Wilson** *(post* p. **63**), the plaintiff for an illegal purpose, placed property in the hands of his son, to be held by him "*as ostensible owner*" *for an indefinite period* the profits to be paid to the plaintiff: it was held that thereby the plaintiff lost the right to reclaim the property by law.

See also **In re Great Berlin Steamship Co.**, *post*, p. **8**; **White v. Hunter**, *post* p. **128**; **St. L. R. Co. v. Mathers** (104 Ill. 259; 71 Ill. 592); **Patterson v. Donner** (48 Cal. 369); **Rock v. Mathews** (35 W. Va. 531; 14 S. E. 137).

As Custodian.—Contract executed.

2. The complainants assisted in placing the control of the railway companies in the hands of the Securities Company, and in maintaining that status until the decree in the Government suit was affirmed by the Supreme Court. This executed the illegal purpose to such a degree as to bar the assertion of any right to withdraw the property deposited.

(**A**) The assertion of any right to withdraw is barred, even though the decree in the Government suit prevents profitable (or any) continuance of the holding of the railway stocks.

As Custodian.—No recovery because of Government's decree.

In **McIntosh v. Wilson** (*post* p. **63**), the object of the contract—*i. e.*, the enabling of the plaintiff to conduct a pharmacy without a license by keeping his son in possession as *ostensible owner*—failed because of the seizure of the property by creditors of the son. The Court held that by the transfer, the *plaintiff lost the right to recover the property by law*, and *it could have been used by the son for the payment of his debts*, and therefore was subject to legal process in favor of the son's creditors.

In Re Great Berlin Steamboat Company (*post* p. **8**): The plaintiff had made a deposit of money for the purpose of giving the Steamboat Company a false credit in order that expected inquiries from Berlin bankers might be favorably answered. *No such inquiries were made* and it appeared that none would be made. An order for compulsory winding-up having been made, the depositor sought to rescind the agreement and to recover back the deposit. His prayer was denied. *The Court here pointed out that any further performance of the illegal purpose had been made impossible by the order for the winding up of the Company.*

See also **Standard Co. v. Van Alstine** (22 Wash. 670; 62 Pac. 145.)

(**B**) The assertion of any right to withdraw is barred, even if the alleged purpose of the deposit has not been wholly accomplished, and even though it were the fact (which it is not) that the custodian still holds the deposit intact.

As Custodian.—No recovery because purpose fails.

In **Herman v. Jeuchner** (*post* **p. 14**), it was held: A contract is illegal, whereby a defendant in a criminal case, who has been ordered to find bail for his good behavior during a specified period, deposits money with his surety upon the terms that the money is to be retained by the surety during the specified period for his own protection against the defendant's default, and at

As Custodian.—No recovery because purpose fails.

the expiration of that period is to be returned; and *no action by the defendant in the criminal case will lie to recover back the money deposited with the surety either before or after the expiration of the specified period, athough the defendant in the criminal case has not committed any default, and although the surety has not been compelled to pay the amount for which he has become bound.*

In **Taylor v. Chester** *(post,* p. **1**), the plaintiff was denied legal assistance to recover a half banknote deposited to secure the payment to the pledgee of a debt founded upon an immoral consideration.

In **Rock v. Mathews** (35 W. Va. 531 : 14 S. E. 137), the delivery of a *trust deed of land* to secure the payment of money promised in composition of a felony, was held to be such an execution of the illegal contract as to preclude the plaintiff from obtaining a rescission of such trust deed.

Griffin v. Piper (55 Ill. App., 213), was a suit to recover membership fees paid by the plaintiff as an associate in an alleged combination of ice-dealers in Chicago, upon common counts of assumpsit and a special count alleging that the defendant was indebted to plaintiff for *money delivered and deposited with the defendant for safe keeping.* The opinion recites that the theory upon which recovery was sought was that the money was still in the possession of the treasurer of the defendant unexpended and that there was a place of repentance, and thereupon sets forth the decision as follows: "Without going into detail "to show that the money paid in has not remained "intact, but has been mingled with much other "money, out of which expenses have been paid, "and of which large investments have been made "in bonds for the use of the association, it is "enough to say that during the whole periods "that the appellants were respectively members, "the money they had paid in was effectively used "for the purpose of the association, as a bond of "union among the members, to keep them up to "their pledges for concerted action in preventing "competition. * * * We must leave these "parties as we find them."

In Re Great Berlin Steamboat Company *(post* p. **8**): The plaintiff had made

a deposit of money for the purpose of giving the Steamboat Company a false credit in order that expected inquiries from Berlin bankers might be favorably answered. *No such inquiries were made* and it appeared that none would be made. An order for compulsory winding-up having been made, the depositor sought to rescind the agreement and to recover back the deposit, on the especial ground that the fraudulent purpose had been in no part accomplished. His prayer was denied. As Custodian.—No recovery because purpose fails.

St. L. R. Co. v. Mathers, 104 Ill., 259. **Same v. Same,** 71 Ill., 592. These cases involved a deed of land *in the nature of a mortgage*, there being a clause providing for defeasance in case the Railroad Company established a station within three miles of a particular place. The Company having *wholly failed to carry out the illegal agreement*, the grantor sought to recover back the land. The rescission was not granted. If, as contended, the law is in such a case to raise and enforce an implied agreement to rescind, then *a fortiori*, an express agreement to the same effect must equally be enforced.

Patterson v. Donner, 48 Cal., 369: This was a similar mortgage with condition subsequent for defeasance in case the grantee did not procure witnesses to testify in an action at law. The grantee failed to perform. Rescission was refused.

See also **Sedalia v. Brady** (78 Mo. App. 585); **Johnson v. Douglas** (32 Wash. 293; 73 Pac. 374).

3. The deposit of the property in the hands of the alleged custodian was part of the illegality, which distinguishes the present case from the stakeholder, agency and third-party cases. Wagering and agency cases distinguished.

(**A**) In the stakeholder cases, the illegality consists in the wager and not in any sense in the deposit subsequent to, though for the purpose of, the wager contract. As Custodian.—Wager and agency cases distinguished.

(**B**) Likewise in the agency and third-party cases, the holding by the agent or third party was perfectly lawful: the illegality lay in some precedent transaction from which arose the fund in the defendant's hands. The relief given involved neither the enforcement nor the rescission of the unlawfnl contract. (See analysis of these cases in **McMullen v. Hoffman,** *post* p. **330.** See also **Smith v. Richmond,** 24 Ky., 1117; 70 S. W., 846).

(**C**) Even in the stakeholder cases, it is recognized that the depositor loses the right to recover after the stakeholder has paid over the fund. By selling shares of its stock, and issuing and reissuing certificates in the usual form—all being done with the assent of complainants—the Securities Company has legally transferred vast interests in the railway shares to innocent third persons. (**Ball v. Gilbert,** *post* p. **75**; **Thornhill v. O'Rear,** *post* p. **45**).

> In **Nudd v. Burnett** (14 Ind., 25), the plaintiff delivered possession of a horse worth $75 in exchange for the defendant's note for $150, which according to its terms was to become null and void in case James Buchanan was not elected President of the United States. The defendant refused to pay the note on demand, and plaintiff sued to recover back the horse, upon the ground that he was repudiating the illegal contract. It was held that the contract was executed on his part by delivery of the horse; that it was too late to rescind; and that "this differs from a suit against a stakeholder, in this, that in the latter class of cases the party repudiates before the contract is executed by delivery to the other contracting party."

As custodian Agency cases distinguished.

(**D**) And in agency or third-party cases, the owner cannot obtain a return of the property, if to give such relief the Court would have to give effect to any part of the illegal contract. In seeking to recover certain of the shares of Northern Pacific stock, the complain-

ants rely upon a material term of the agreement alleged by them, though denied by defendant.

> "The relief sought would require the court to "investigate all of the various transactions of "these parties, from the beginning to the end of "their unlawful enterprise and adjust the differ- "ences between them. This is precisely what the "courts have always refused to do." (**Leonard v. Poole**, *post* p. **224**).

IV.

The doctrine of an implied agreement to return property transferred under an illegal agreement, is applicable only to cases wherein there exist special considerations of public policy, equity or justice.

No basis for implied agreement to return.

1. No public policy will be promoted by granting the prayer of complainants (see opinion of THAYER, J., [128 Fed., 808], upon denial of Harriman's petition to intervene in Government suit). Furthermore, considerations of public policy in the Northern Securities transaction can be invoked only by the Attorney General of the United States (**Minnesota v. Northern Sec. Co.** 194 U. S. 28.)

No public policy.

2. It is difficult to conceive of a case where equity and justice would require the implication of an agreement to return, except under circumstances such as existed in **Pullman v. Central** (*post* p. **307**), or in the repudiated bond cases cited in **Central v. Pullman** (*post* p. **279**), or where stock paid for was not issued because *ultra vires* the corporation as in **Spring Co. v. Knowlton** (*post* p. **256**). Certainly no such considerations prevail in the present instance.

No equitable considerations.

(a) That an agreement to return property received for an illegal purpose, will not be implied by a court of equity in the absence of strong considerations of

No implied agreement. No equity.

justice, is shown by the decision upon the counterclaim in **Higgins v. McCrea** (116 U. S. 671). In that case, the plaintiff, a commission broker, sued for the balance of moneys paid for account of defendant upon the settlement in August, 1883, of certain contracts made in May for the future delivery of produce. The answer in effect averred that the transactions were gambling transactions; that the contracts made for defendant had been cancelled by plaintiff shortly after the making thereof, and that the settlement in August was not of defendant's transactions; and by way of counterclaim the defendant prayed to recover the moneys "paid by him to the plaintiff to promote and carry on said gambling transactions". Upon the evidence, the court found that the contracts *had* been cancelled by plaintiff almost immediately after the making thereof, and this left the defendant, upon the face of his counterclaim, in the position of having paid money to the plaintiff to be used to carry on illegal and criminal gambling transactions (but presumably not used in any such transaction), which money he sought to recover back. Upon the cause of action thus presented by the counterclaim, Mr. Justice Woods, delivering the opinion of the Court, said: "*We do not "see on what ground a party, who says in his pleading "that the money which he seeks to recover was paid out "for the accomplishment of a purpose made an offence "by the law, and who testifies and insists to the end of "his suit that the contract on which he advanced his "money was illegal, criminal, and void, can recover it "back in a court whose duty it is to give effect to the law "which the party admits he intended to violate.*"

To the same effect is the decision **In re Great Berlin Steamboat Co.** (*post* p. **8**), denying an application for the return of money gratuitously deposited with the Company for a fraudulent purpose, the depositor having made no attempt to withdraw the money until winding-up proceedings rendered impossible any further accomplishment of the illegal object.

See also **C. I. & L. Ry. v. S. I. Ry.** (70 N. E. 843.)

No implied agreement.—*Laches.*

(b) But in any event, any equitable rights of the complainants have been lost through their laches and the acquisition by innocent third persons of interests adverse to their claim. *Locus poenitentiae* must be sought seasonably.

In the **Vandalia case** (post p. **265, 278**), wherein the corporation suing had permitted the de-

fendant to operate under the ultra vires lease for less than one-fiftieth of the term, it was held that "so far "as the plaintiff corporation can be considered as "representing the stockholders and seeking to protect "their interests, it and they are barred by laches."

In *Union Trust Co. v. Illinois Midland Co.*, 117 U. S. 434 (see **Central v. Pullman,** post p. **279, 300**), after one railroad corporation had purchased of two others their connecting railroads and their franchises, a receiver had been appointed of the three railroads, and, under the direction of the court, and *without objection by any of the parties interested, had incurred expenses and issued certificates accordingly.* It was held that the *holders of bonds secured by mortgage of one of the purchased railroads could not, for want of affirmative legislative authority for the sale and purchase of that road, claim a priority of lien upon it as against the holders of the receiver's certificates.*

In **Re Great Berlin Steamboat Co.** *(post* p. **8**), the appellant was seeking in proceedings for the winding up of the company, to recover the balance remaining of a deposit made by him with the company for a fraudulent purpose; and it was held that having left the money on deposit as long as the possibility of carrying out the illegal purpose continued, he had lost whatever right he might have had to reclaim it.

V.

No right of action accrues to complainants because the Securities Company has been compelled to abandon the illegal project by force of the decree in the Government suit.

Abandonment of holding gives no right of action.

In **Central Co. v. Pullman Co.** *(post* **279, 299**), Mr. Justice GRAY refers with approval to that part of the opinion of Mr. Justice MILLER in *Thomas v. Railroad Co.* (101 U. S., 71), where it was "in the most emphatic words, said that in the "case before the court, of a contract forbidden by "public policy and beyond the powers of the de"fendant corporation, it was its illegal duty, *a duty "both to its stockholders and to the public, to re"scind and abandon the contract* at the earliest

"moment, and the *performance of that duty,* "*though delayed for several years, was a rightful* "*act when done, and could give the other party no* "*right of action.*"

See also **People v. Globe Ins. Co.** (91 N. Y. 174).

VI.

No enforceable agreement to return.

It is not understood that complainants contend that there was any contract on the part of the Securities Company to return the stocks to the depositors. But if the complainants do so contend, the relief now asked for would be an enforcement of part of the contract. As well might a usury-exacting lender recover the principal of his loan by disaffirming the contract.

No part of an illegal contract will be enforced. (See **McMullen v. Hoffman,** *post* p. **330; Ellicott v. Chamberlin,** *post* pp. **139, 144**).

St. L. R. Co. v. Mathers, 104 Ill., 259. **Same v. Same,** 71 Ill., 592: These cases involved a deed of land *in the nature of a mortgage*, there being a clause providing for defeasance in case the Railroad Company established a station within three miles of a particular place. The Company *failed to carry out the illegal agreement* (having established a station within three miles of the designated point), and the grantor sought to recover back the land. The rescission was not permitted. If, as contended, the law is in such a case to raise and enforce an implied agreement to rescind, then *a fortiori*, an express agreement to the same effect must equally be enforced.

Patterson v. Donner, 48 Cal., 369: This was a similar mortgage with condition subsequent for defeasance in case the grantee did not procure witnesses to testify in an action at law. The grantee failed to perform. Rescission was refused.

Black v. Oliver (1 Ala. 449: 35 Am. Dec. 38)

was an action of detinue for the recovery of a negro slave. The evidence showed that the slave in controversy was sold by the defendant in error at a very reduced price to one Sweet, upon condition that he should make her his wife (which was illegal) and emancipate her, and that the condition had not been performed. It was held that the condition subsequent was illegal and void; that the contract of sale was executed in all other respects, and that the court would not interfere in favor of either party. No enforceable agreement to return.

See also **Singer Mfg. Co. v. Draper** (103 Tenn. 262; 52 S. W. 879); **Standard Co. v. Van Alstime** (22 Wash. 670; 62 Pac. 145).

[L. R. 4 Q. B. 309 : 6 English Ruling Cases, 488.]

Taylor v. Chester.

1869.

Pledge-Bailment-Immoral Consideration—"In pari delicto potior est conditio possidentis."

The plaintiff deposited with the defendant the half of a 50*l.* bank note by way of pledge to secure the payment of money due from the plaintiff to the defendant. The debt was contracted for wine and suppers supplied to the plaintiff by the defendant in a brothel kept by her, to be there consumed in a debauch. The plaintiff having brought an action to recover the half-note :—

Held, that the maxim, *in pari delicto potior est conditio possidentis*, applied ; and that as the plaintiff could not recover without showing the true character of the deposit, and that being on an illegal consideration to which he was himself a party, he was precluded from obtaining the assistance of the law to recover it back.

This was an action to recover the half of a 50*l.* Bank of England note. The pleadings, facts, and course of the trial, are fully stated in the judgment of the Court.

Feb. 2. *Hopwood (Holker, Q. C.*, with him), for the defendant. It is a well-known maxim of law, "*in pari delicto potior est conditio defendentis.*" If the whole contract contained in the proceedings were set out in a declaration, it would be quite clear that the plaintiff could not recover. In Chitty on Contracts, p. 579, 6th ed., it is stated : "Whenever the contract which a party seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect * * * and the test as to whether a demand connected with an illegal transaction be capable of being enforced at law is, whether the plaintiff requires to rely on such transaction in order to establish his case." The contract is allowed to be impeached on

grounds of public policy: *Holman v. Johnson* (Cowp. at p. 343.) In Story's Equity Jurisprudence, s. 298, it is also laid down that where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*, courts of equity, following the rule of the law as to participators in a common crime, will not interpose to grant any relief; acting upon the well-known maxim, "*in pari delicto portior est conditio defendentis et possidentis.*" So in *Biggs v. Lawrence* (3 T. R. 454), the plaintiffs could not recover for goods sold to the defendant where they knew that the goods were purchased to be smuggled, and they had packed them for that purpose. *Clugas v. Penaluna* (4 T. R. 466) is to the same effect. The replication is no answer to the plea, and the judgment ought to be entered for the defendant on the whole record.

Feb. 3. *Herschell* (*Pope* with him), for the plaintiff. Even if, upon the demurrer, the replication is bad, the plaintiff is entitled to the verdict on the count on detinue. *Mason v. Fernell* (12 M. & W. 674) shows that if the defendant has a special property in the subject-matter of the action, he must plead it specially, and cannot rely on the pleas of non detinet and not possessed. The special plea does not set out the whole truth, and was not proved. If the defendant had pleaded the plea according to the truth, it would have been bad; the replication which was proved must be read with it. The jury have found the issue on the replication for the plaintiff, and he is entitled to have the verdict entered on it. But on the question as raised by the pleadings, it is not the plaintiff, but the defendant who relies upon the immorality. The plaintiff does not claim to succeed upon any contract, but on his right of property in the half-note. The cases which may be cited against the plaintiff are divisible into two classes—first, where it is sought to enforce an illegal contract; secondly, where the person from whom the illegal consideration has moved relies upon the illegality to recover back the money

paid under the contract. But these cases do not apply, because here it is the defendant who, by means of an immoral contract, seeks to detain the note deposited.

(HANNEN, J.—*Parke, B.*, in *Scarfe v. Morgan* (4 M. & W. at p. 281), says: "If an illegal contract is executed, and a property either special or general has passed thereby, the property must remain.")

That has never been decided; if it were law, the Court would have to go into all the circumstances of the illegal contract to see if the property had passed.

If the plaintiff be right in his contention, it will be unnecessary for the Court to consider the question of illegality; and if it decides in his favour, they will not enforce the immoral contract; but if they decide in favour of the defendant, they will uphold an illegal agreement. If the contract to supply the plaintiff with the means to commit immorality be void, the deposit to procure the means is also void: *Cannan v. Bryce* (3 B. & A. 179); and on the same principle a covenant to pay for the price of land sold to the covenantor for an illegal purpose has been held not to be enforceable; *Bridges v. Fisher* (3 E. & B. 642; 23 L. J. [Q. B.] 276).

(MELLOR, J. It is well established by *Pearce v. Brooks* (Law Rep. 1 Ex. 213), and the cases there cited, that if a person makes a contract with the knowledge that another intends to apply its subject-matter to an immoral purpose, he cannot recover upon it.)

Those were all cases where the Court was asked to enforce the illegal contract

(HANNEN, J. If a person lets a house for an immoral purpose, are his enforceable rights gone, so that he cannot bring ejectment? In this case a special property has passed to the defendant, and according to *Ferret v. Hill* (15 C. B. 207; 23 L. J. [C. P.] 185), where an interest in realty has passed, it cannot be avoided on the ground that it has been gained by a misrepresentation.)

The special property can only be given by the special contract, and the defendant must set up the special contract to detain the note. Suppose the plaintiff had tendered the amount for which the half-note was pledged, the defendant's lien would be at an end; could it then be argued that the plaintiff would not be entitled to recover the half-note?

Holker, Q. C., replied.

Cur. adv. vult.

April 20. The judgment of the Court (MELLOR and HANNEN, JJ.) was delivered by

MELLOR, J. In this case the plaintiff declared on the bailment of the half of a 50*l.* Bank of England note, to the defendant, to be redelivered on request, alleging a refusal by the defendant to redeliver such half-note. The second count was in detinue for the same half-note?

The defendant, after traversing the delivery and detention of the note, and to the second count denying that it was the property of the plaintiff, pleaded separately and specially to both counts, in effect, that the half-note in question had been deposited by the plaintiff with the defendant by way of pledge, to secure the repayment of money due and money then advanced by the defendant to the plaintiff and then due.

The plaintiff joined issue on the defendant's pleas, and also replied specially that the alleged debt or sum, in respect of which the defendant justified the non-delivery and detention of the half-note, was for wine and suppers, supplied by the defendant in a brothel and disorderly house kept by the defendant, for the purpose of being consumed there by the plaintiff and divers prostitutes in a debauch there, to incite them to riotous, disorderly and immoral conduct, and for money knowingly lent for the purpose of being expended in riot and debauchery and immoral conduct.

The defendant rejoined, taking issue on the replication, and also demurred to its validity.

On the trial before me at Manchester, the case of the plaintiff was that the note had not been deposited at all with the defendant, but had been fraudulently taken and appropriated by her. The jury, however, did not adopt his view of the facts, but found that the note was deposited by way of security, as alleged by the defendant, and they further found upon the evidence that the debt was incurred and the money advanced as alleged in the plaintiff's replication to the special pleas. On these findings, the verdict was entered for the defendant, with liberty to the plaintiff to move to enter the verdict for him for 50*l*, to be reduced to nominal damages in case the note should be returned to the plaintiff.

A rule was accordingly obtained to enter the verdict for the plaintiff, on the ground that the jury had found all the issues tendered by the plaintiff in his favour.

This rule and the demurrer to the replication came on together for argument at the sittings in banco after last Hilary Term, before my Brother HANNEN and myself, and at the close of the argument we took time to consider our judgment.

It was argued on the part of the defendant, in showing cause against the rule, and in support of the demurrer to the special replication of the plaintiff, that, upon the finding of the jury and the facts as admitted by the demurrer, the plaintiff and defendant were *in pari delicto*, and that therefore upon the whole record judgment must be entered for the defendant. On the part of the plaintiff it was argued that it was the defendant who was relying on the illegal transaction as an answer to a claim of the plaintiff, founded on his ownership of the note, and his rights to recover back the same, and many startling consequences were pointed out to us as likely to result from a decision that the plaintiff could not recover. We have fully considered the case, and are satisfied that the plaintiff cannot recover under the circumstances found by the jury, and admitted on the record. The maxim that

"*in pari delicto potior est conditio possidentis*," is as thoroughly settled as any proposition of law can be. It is a maxim of law, established, not for the benefit of plaintiffs or defendants, but is founded on the principles of public policy, which will not assist a plaintiff who has paid over money or handed over property in pursuance of an illegal or immoral contract, to recover it back, "for the courts will not assist an illegal transaction in any respect:" per Lord ELLENBOROUGH in *Edgar v. Fowler* (3 East, 222); *Collins v. Blantern* (2 Wils. 341); Lord MANSFIELD in *Holman v. Johnson* (Cowp. at p. 343).

The true test for determining whether or not the plaintiff and the defendant were *in pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party: *Simpson v. Bloss* (7 Taunt. 246), *Fivaz v. Nicholls* (2 C. B. 501). It is to be observed that in this case the illegality is not in a collateral matter, as in the case of *Ferret v. Hill* (15 C. B. 207; 23 L. J. [C. P.] 185), which was cited for the plaintiff; but is the direct result of the transaction upon which the deposit of the half-note took place.

Mr. Herschell's argument was based upon the hypothesis that, in spite of the finding of the jury, the plaintiff was entitled to recover by virtue of his property in the half-note, and that it was the defendant alone who set up an immoral transaction as the answer to the plaintiff's claim.

This argument appears to us to be founded upon an entirely erroneous view of the facts. The plaintiff, no doubt, was the owner of the note, but he pledged it by way of security for the price of meat and drink provided for, and money advanced to, him by the defendant. Had the case rested there, and no pleading raised the question of illegality, a valid pledge would have been created, and a special property conferred upon the defendant in the half-note, and the plaintiff could only

have recovered by showing payment or a tender of the amount due. In order to get rid of the defence arising from the plea, which set up an existing pledge of the half-note, the plaintiff had recourse to the special replication, in which he was obliged to set forth the immoral and illegal character of the contract upon which the half-note had been deposited. It was, therefore, impossible for him to recover except through the medium and by the aid of an illegal transaction to which he was himself a party. Under such circumstances, the maxim "*in pari delico potior est conditio possidentis*," clearly applies, and is decisive of the case.

It would also appear from the case of *Scarfe v. Morgan* (4 M. & W. at pp. 281, 282), per PARKE, B., in delivering the judgment of the Court, that, notwithstanding the illegality of the transaction itself out of which the deposit in this case arose, the lien would exist, because the contract was executed and the special property had passed by the delivery of the half-note to the defendant, and the maxim would apply "*in pari delicto potior est conditio possidentis.*"

It is, however, sufficient in the present case to determine it on the ground that the plaintiff could not recover without showing the true character of the deposit; and that being upon an illegal consideration, to which he was himself a party, he was precluded from obtaining "the assistance of the law" to recover it back. It is not necessary to consider what might have been the effect of a tender of the amount for which the note was pledged, and there is nothing to raise any such question in this case.

The result, therefore, will be that the verdict must stand for the defendant on the issues taken on the special pleas, and for the plaintiff on the issue taken on the replication; but as upon the whole record it is manifest that the plaintiff cannot recover, judgment will be entered for the defendant.

Judgment for the defendant.

[L. R. 26 Ch. D. 616.]

1884.

In re Great Berlin Steamboat Company.

Fraudulent Agreement—Rescinding Fraudulent Agreement— Winding-up.

B., for the purpose of enabling a company to have a fictitious credit in case of inquiries at their bankers, placed money to their credit which they were to hold in trust for him. Some of the money having been drawn out with B.'s consent, and the company having been ordered to be wound up while a balance remained :—

Held (affirming the decision of Bacon, V. C.), that B. could not claim to have the balance paid to him.

The company was formed on the 21st of April, 1882, for the acquisition and working of a concession from the German Government for the running a line of steamers on the River Spree and the ship canal from Berlin to Spandau. The nominal capital was £50,000, in 10,000 shares of £5 each, but no allotment of shares was ever made, and no shares were subscribed for except the seven shares agreed to be taken by the seven subscribers to the memorandum, which they had not paid for.

The Appellant, J. P. Bowden, deposed that about the 21st of March, 1883, he was applied to through his solicitors by the directors of the company to transfer a sum of £1,000 to the credit of the company at their bankers, Messrs. Glyn, Mills & Co., so that they might have a creditable balance in case of inquiries from certain Berlin bankers with whom they were endeavoring to place a number of the shares of the company, it being agreed that the sum was not to be used for the general purposes of the company, and that the company were merely to hold the sum as trustees for him.

The Appellant further deposed that on the 21st of

March, 1883, the following resolution was passed by the board:

"Resolved to accept £1,000 for a period of one month from Mr. J. P. Bowden for the purpose of having it placed at Messrs. Glyn, Mills, Currie & Co. to the credit of the company, for the purpose of having a creditable balance in case of inquiries from Berlin bankers, but not for the general purposes of the company, such money to be returned intact at the expiration of one month. No cheque to be drawn by the company unless countersigned by the financial secretary, *pro tem.*, the company merely holding such sum as trustee for the said J. P. Bowden. Further, to appoint Mr. A. E. Bunn financial secretary, *pro tem.*, for two months certain without salary, or until the £1,000 is repaid, but with power for the said A. E. Bunn to resign at seven days' notice within that period."

The £1000 was paid by Bowden to the credit of the company.

Subsequently the appellant was applied to by the directors to allow sums to be drawn out from the above £1000 for the purposes of the company, and he assented to this. The greater part of it was accordingly drawn out by cheques countersigned by the above-named Mr. A. E. Bunn, who was one of the Appellant's solicitors, and applied for purposes not alleged to be improper, leaving a balance of £99 15s. It appeared that the company never had any other money to its credit than Bowden's £1000.

It appeared that no Berlin banker ever made any inquiry as to the funds of the company, and in November, 1883, a letter was received from Berlin which shewed that no application by any Berlin banker was to be expected.

On the 12th of January, 1884, an order was made for the compulsory winding up of the company. The £99 15s was then standing to the credit of the company. Bowden made an affidavit in opposition, in which he stated himself to be a creditor for £1350, but did not say anything as to his claim to the £99 15s. Bowden claimed to prove against the company for £1350, which appeared not to include the £99 15s.

On the 21st of February, 1884, Bowden took out a summons in the winding-up to have the £99 15s. paid to him. The application was adjourned into Court, and on the 7th of March, 1884, Vice-Chancellor BACON dismissed it with costs.

Bowden appealed, and the appeal was heard on the 7th of May, 1884.

Upjohn, for the Appellant:—

It is alleged that the deposit was made for a fraudulent purpose and therefore cannot be recovered. But the purpose for which the money was deposited failed, so as the fraud (if any) was only inchoate, I have a right to revoke the arrangement and have my money back so far as it has not been applied: *Symes v. Hughes*, Law Rep. 9 Eq. 475; *Taylor v. Bowers*, 1 Q. B. D. 291. The drawings out must be attributed in my favour, *Knatchbull v. Hallett*, 13 Ch. D. 696, if any other moneys have been paid in, this being trust money; but on the evidence it does not appear that the company ever had any other money to its account.

Martin, Q. C., and *Ryland*, *contra*:—

The Vice-Chancellor said that if a man puts money into the hands of the company to give it a fictitious credit that is a fraud, and he cannot then turn round and say that the money is his. As to *Symes v. Hughes*, nothing had occurred to prevent repudiation of the illegal agreement. Here nothing was done to repudiate it till after the commencement of the winding-up. *Taylor v. Bowers* is inapplicable for the same reason. *Knatchbull v. Hallett* does not apply, for this is a case of a fraudulent loan, not of trust. There was a fraudulent intent to deceive not only the Berlin bankers but the public, and this intention continued till the commencement of the winding-up which fixes the rights of the parties. The present is an attempt by a lender to be paid in full.

Upjohn, in reply:

The commencement of the winding-up prevents any subsequent alteration in rights of property, but I say that this was my property all along. The commence-

ment of the winding-up puts an end to the purpose for which the money was advanced, and so takes the case out of the objection that the fraud continues.

BAGGALLAY, L. J.:

In my opinion this appeal fails. On the 21st of March, 1883, a resolution was passed by the directors in these terms. (His Lordship read the resolution.) It is not disputed that the £1000 was placed by the Appellant to the credit of the company at the bank of Glyn & Co. for a fraudulent purpose. *But the Appellant says that the money was never applied for any fraudulent purpose, that the purpose came to an end, and that he is entitled to have the money back as being impressed with a trust in his favour.* What happened was, that about £900 was drawn out pursuant to resolutions of the directors with the consent of the Appellant, for purposes which were not fraudulent, and was applied accordingly. In November last a communication was received by the directors from a person who was negotiating for them at Berlin, from which it appeared that no applications had been made by any Berlin bankers, and that none were to be expected. In the view I take of the case, I think it was then open to the Appellant to say at once, "The purpose for which this money was advanced cannot be carried into effect; pay me back the balance." But the Appellant did not recall his money. It was possible, though not probable, that applications might still be received from Berlin bankers, and that the scheme might be carried out. **The Appellant, however, did nothing to repudiate the arrangement, and so matters remained till the presentation of the petition to wind up. Then, after a winding-up order has been made, he brings forward this claim. There have been cases in which a party who has parted with his property under a fraudulent arrangement, has nevertheless been allowed to recover the property, but**

this case differs from them in many respects, especially in this, that there was no repudiation till after the commencement of the winding-up.

COTTON, L. J.:

I am of opinion that the decision of the Vice-Chancellor is right. I think it the just results of the evidence that the balance now in dispute is ear-marked as part of the money which the Appellant advanced. Then the Appellant says that the company were to hold this sum in trust for him, and the resolution no doubt says that they shall. But that declaration of trust is coupled with a statement that the advance is made in order that the company may appear to have a creditable balance at their bankers if inquiries are made—a purpose which is admitted to be fraudulent. The money was to be represented to be the money of the company, but by private arrangement it was not to be their money. Then it is said that a person who parts with his property for a fraudulent purpose may repudiate the bargain and get his property back. I give no opionion whether in November last the Appellant could have done so. He did not attempt to do so, but **waited till the event happened which put an end to the purpose for which the money was deposited.** He left the money at the bank as long as the possibility of carrying out the illegal purpose continued, and **it is now too late for him to reclaim it.** *Assuming* that he had the right to repudiate the bargain, he has, in my opinion, lost that right.

LINDLEY, L. J.:

I also am of opinion that the decision of the Vice-Chancellor is correct. I am not satisfied that this was not a case of loan as distingished from trust, and if that is the true view it is fatal to the Appellant's case. But if it was a case of trust, the Appellant must shew what the trust was. He does so, and

shewes an illegal trust, since the purpose of the advance was to give a fictitious credit to the company. The trust at first was to last only for a month. The sum was drawn upon, and the residue was left in the hands of the company to get them credit. If the case is one of debt the Appellant is not entitled to be paid in full. Whether it was loan or trust, I think that the Appellant might have recalled the money at the end of the month. He did not do so, but left it where it was till the commencement of the winding-up. **The object for which the advance was made was attained as the company continued to have a fictitious credit till the commencement of the winding-up. After that I think it is too late for the Appellant to repudiate the bargain and claim the money.**

Solicitors for Appellant: *Arnold E. Williams & Bunn.*

Solicitor for liquidator: *Montagu Hawkins.*

H. C. J.

[L. R. 15 Q. B. Div. 561.]

1885.

IN THE COURT OF APPEAL.

Herman v. Jeuchner.

Illegality—Contract—Bail in Criminal Case—Indemnity of Surety—Deposit of Money with Surety—Action to Recover Money Deposited.

A contract is illegal, whereby a defendant in a criminal case, who has been ordered to find bail for his good behavior during a specified period, deposits money with his surety upon the terms that the money is to be retained by the surety during the specified period for his own protection against the defendant's default, and at the expiration of that period is to be returned; and no action by the defendant in the criminal case will lie to recover back the money deposited with the surety either before or after the expiration of the specified period, although the defendant in the criminal case has not committed any default, and although the surety has not been compelled to pay the amount for which he has become bound.

Wilson vs. Strugnell (7 Q. B. D. 548) as to this point overruled.

Action to recover the sum of 49*l.*

The plaintiff has been convicted of keeping a disorderly house, and had been ordered to find two sureties in 50*l.* each for his good behavior for two years. Being unable to find more than one surety, the plaintiff was imprisoned in default. He then desired the defendant to become surety for him, but the defendant refused, unless the amount for which he was to become surety should be deposited with him for the space of two years. The plaintiff accordingly deposited with the defendant the sum of 49*l.*, who thereupon became surety for the plaintiff and he was released. The plaintiff before the expiration of the two years brought the present action to recover back the 49*l.* deposited

with the defendant, and STEPHEN, J., before whom the action was tried, gave judgment for the plaintiff on the authority of his former decision in *Wilson v. Strugnell* (7 Q. B. D. 548).

The defendant appealed.

Alfred Cock, for the defendant. First, the action is brought too soon: the two years had not expired. Secondly, at the trial, STEPHEN, J., gave judgment for the plaintiff upon the authority of *Wilson v. Strugnell* (7 Q. B. D. 548); but that case was not rightly decided and ought not to be followed. The object of the transaction between the plaintiff and the defendant was that the defendant should not in fact be personally responsible for the plaintiff's good behavior, although he was to be held out to the court as personally liable for the sum of 49*l*. This was an illegal purpose, and the plaintiff cannot recover without proving that it did in truth exist: therefore the principle of *Taylor v. Chester* (Law Rep. 4 Q. B. 309) applies. The plaintiff cannot rely upon *Bone v. Ekless* (5 H. & N. 925), because in that case the illegal purpose had not been carried out, nor upon *Taylor v. Bowers* (1 Q. B. D. 291), because in that case, the plaintiff did not seek to uphold the illegal transaction but was repudiating it.

[BOWEN, L. J. If the illegal purpose had not been carried out, it appears to be clear that the money deposited can be recovered back: *Tappenden v. Randall*, 2 B. & P. 467. But in the present case the illegal purpose seems to have been effected.

BRETT, M. R. The test whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires any aid from the illegal transaction to establish his case: *Simpson v. Bloss* (7 Taunt. 246).]

In *Cripps v. Hartnoll* (4 B. & S. 414; 32 L. J. [Q. B.] 381) the promise to indemnify was not made by the person for whose appearance the surety was bound: moreover, that case was decided upon a question as to the construction of the Statute of Frauds, and not

upon a question of illegality. In *Jones v. Orchard* (16 C. B. 614, at p. 624), the Court of Common Pleas seemed to be of opinion that an action like the present was not maintainable.

Stanley Boulter, for the plaintiff. The present case is identical with *Wilson v. Strugnell* (7 Q. B. D. 548); and if that case was rightly decided, the present plaintiff is entitled to succeed. The contract is still executory, and not executed. It may be that the plaintiff must admit that the contract had an illegal object, for otherwise he could not recover until the expiration of the two years; it is no doubt the illegal object which gives him the right to rescind: but the illegality consisted in the payment of the money upon the default of the plaintiff, and the money has never been paid: therefore the illegal purpose has never been fulfilled.

Alfred Cock was not called upon to reply.

BRETT, M. R. In this case the plaintiff has sued upon a contract entered into between himself and the defendant. What is it that determines and constitutes a contract not under seal? It is the consideration and the promise: these two incidents are necessary to constitute every simple contract: taken together, they form the whole of the contract. When the object of either the promise or the consideration is to promote the committal of an illegal act, the contract itself is illegal and cannot be enforced. In the present case the defendant required the plaintiff to deposit 49*l.* for the space of two years, and in consideration of the plaintiff so doing the defendant promised the plaintiff to become a surety for him; the plaintiff on his part undertook to deposit the 49*l.* That is the substance of the contract; is it illegal? To my mind it is illegal, because it takes away the protection which the law affords for securing the good behavior of the plaintiff. When a man is ordered to find bail, and a surety becomes responsible for him, the surety is bound at his peril to see that his principal obeys the

order of the Court; at least, this is the rule in the criminal law; but if money to the amount for which the surety is bound is deposited with him as an indemnity against any loss which he may sustain by reason of his principal's conduct, the surety has no interest in taking care that the condition of the recognizance is performed. Therefore the contract between the plaintiff and the defendant is tainted with illegality.

It was first argued that the action is brought too soon, because it is brought before the expiration of the two years. If the contract were legal, the action would have been brought too soon, and in this point of view the action can be maintained only if the contract is illegal. For the defendant it may be said that the illegal object itself would be sufficient to prevent the plaintiff from recovering; and further, that if it is necessary in order to defeat the action that the illegal contract should be performed, the illegal contract has in this case been performed. I will not stop to say whether in order to defeat the plaintiff in an action like this the defendant must be able to prove that the illegal object is performed, or whether it is sufficient that the contract itself shall be tainted with illegality; for *if the contract is illegal and has been performed, then the person vouching the illegality cannot recover. In this case the illegal purpose has been wholly performed, and therefore the plaintiff cannot recover.* We differ from STEPHEN, J., only in this, that we think that the contract was fully concluded; STEPHEN, J., thought that the contract was not fully concluded. We think that it was fully performed for this reason, that the defendant did not contract with the plaintiff to pay the amount of the recognizance; the payment of that amount was not part of the illegal purpose existing between the plaintiff and the defendant; it was an obligation imposed by the law upon the defendant. **The illegal purpose was fully completed when the defendant became surety. The time for returning the money has not as yet arrived; but**

when it does, I cannot think that the plaintiff will be in any better position than he is now. I cannot agree with the view of STEPHEN, J., or with his decision.

BAGGALLAA, L. J. I will very briefly state my view of this case. If the defendant had been compelled to pay the sum on account of the plaintiff's breach of the condition of the recognizance, it must be admitted that the defendant would be entitled to succeed; the maxim, "*in pari delicto, potior est conditio possidentis*," would apply. But the rule governing the present case is, I think, well stated by MELLOR, J., in delivering the judgment of the Court of Queen's Bench in *Taylor v. Chester* (Law Rep. 4 Q. B. 309, at p. 314). He there said: "The true test for determining whether or not "the plaintiff and the defendant were *in pari delicto*, is "by considering whether the plaintiff could make out "his case otherwise than through the medium and by "the aid of the illegal transaction to which he was him-"self a party." Applying that rule to the present case, I am of the opinion that the defendant is entitled to judgment. I do not think it necessary to refer minutely to the decision of STEPHEN, J., in *Wilson v. Strugnell* (7 Q. B. D. 548), and to the reasoning upon which it is founded. I am far from expressing dissent as to his view that where the illegal purpose has not been effected, the money deposited may be recovered back; **but, on the other hand, I am hardly prepared to say that, in order to prevent a plaintiff from succeeding who sues to recover back money deposited in furtherance of an illegal purpose, the illegal object itself must be fully carried out.**

BOWEN, L. J., concurred.

Judgment the for defendant.

[L. R. 24 Q. B. Div. 742.]
1890.

IN THE COURT OF APPEAL.

Kearley v. Thomson and Another.

Illegal Contract. Partial Performance. Bar to Action for Money Paid.

Where money is paid under an illegal contract which has been partially carried into effect, the money cannot be recovered back.

The defendants were solicitors to the petitioning creditor in certain bankruptcy proceedings, and had incurred costs which were to be paid out of the estate. The plaintiff, a friend of the bankrupt, offered to pay to the defendant a sum of money for these costs, which had not been paid owing to want of assets, on their undertaking not to appear at the public examination of the bankrupt, and not to oppose his order of discharge. The defendants, with the consent of their client, agreed to this, and received the money. They did not appear at the public examination of the bankrupt, and, before any application for his discharge had been made, the plaintiff brought an action to recover back the money from the defendants:—

Held, that, though the contract was illegal, the partial performance of it prevented the plaintiff from recovering back the money paid under it.

Appeal from a judgment of the Queen's Bench Division in favor of the defendants.

The action was brought under the following circumstances:—The defendants were solicitors, and acted for a client in presenting a petition in bankruptcy against one William Clarke, against whom a receiving order was made. The costs of the petitioning creditor were ordered to be paid out of the estate. Before the public examination of the bankrupt came on, the plaintiff who was a friend of the bankrupt, had an in-

terview with the defendants, at which a discussion arose as to the defendants' costs in the bankruptcy proceedings, none of which, from want of assets in the bankruptcy, had been paid, and the defendants undertook not to attend on the debtor's public examination, or to oppose his discharge, provided the plaintiff paid them an agreed sum for such costs. The plaintiff accordingly paid to the defendants at the time 20*l.*, for which the following receipt was given: "At the request of Mr. Kearley we have received from him the sum of 20*l.* on account of our costs herein, and he is to pay us before twelve to-morrow the further sum of 20*l.*, and in consideration of this sum of 40*l.* we waive all our claims for costs, and undertake not to appear at the bankrupt's public examination, nor to oppose his order of discharge. Thompson & Ward." The further sum of 20*l.* was paid to the defendants. The arrangement was made by the defendants with the consent of their client and for his benefit. The debtor passed his public examination, at which the defendants did not appear. At the time the action was brought, the debtor had not applied for his order of discharge. The plaintiff claimed a return of the 40*l.* that he had paid to the defendants as above mentioned, and the defendants offered to have their costs taxed, and to return to the plaintiff the balance (if any) that might remain of the 40*l.*, after deducting the taxed costs. The plaintiff refused this offer, and brought this action for the return of the money he had paid. The case was tried before *Field*, J., without a jury, and the parties were left to move for judgment. The Queen's Bench Division (*Huddleston*, B., and *Stephen*, J.) ordered judgment to be entered for the defendants.

The plaintiff appealed.

1890. Feb. 20. Crump, Q. C., and Woolf, Q. C., in support of the appeal. The contract was illegal: *Hall v. Dyson* (17 Q. B. 785). The plaintiff is not trying to make out his case through the medium and by the aid

of the illegal transaction, which is the test laid down in *Taylor v. Chester* (Law Rep. 4 Q. B. 309), for determining whether the plaintiff and defendant are *in pari delicto ;* he is trying to set aside the transaction. He can do this so long as the contract is not fully carried out, for the money remains his, and he can recover it back. This is the effect of the judgment of *Mellish*, L. J., in *Taylor v. Bowers* (1 Q. B. D. 291), and of *Lord Esher*, M. R., in *Herman v. Jeuchner*, (15 Q. B. D. 561).

(They cited also *Tappenden v. Randall* (2 B. & P. 467) and *Aubert v. Walsh* (3 Taunt. 277).

Edward Clayton, (Jelff, Q. C., with him), for the defendants. The property in the money passed under the contract to the defendants, and so, if the contract was illegal, the illegality must be the basis of the plaintiff's claim. The plaintiff and defendants are *in pari delicto* and the maxim "*potior est conditio possidentis*" applies. The authorities do not support the proposition that it is necessary, in order to prevent the plaintiff from recovering, that the contract should have been fully performed ; it is sufficient if there has been performance of a substantial part. (He also proposed to submit *(inter alia)* that, under the Bankruptcy Act, 1883, the contract was legal, but was stopped.)

Crump, Q. C., in reply.

1890. March 31. FRY, L. J. I have been asked by the Lord Chief Justice to deliver the judgment in this case, and I may also state that I have had an opportunity of consulting the Master of the Rolls on the judgment I am about to deliver, and he has authorized me to express his concurrence with it.

The facts are shortly these :—A petition in bankruptcy was presented by one Baynes against Clarke, and a receiving order was made. The defendants were the solicitors acting for the petitioning creditor. That being the condition of things, the plaintiff, who ap-

pears to have been a friend of Clarke, intervened, and on October 6, 1887, Messrs. Thomson & Ward, the defendants, wrote this letter to the plaintiff Kearley: "*Re* Clarke. At the request of Mr. Kearley we have received from him the sum of 20*l.* on account of our costs herein, and he is to pay us before twelve to-morrow a further sum of 20*l.*; and in consideration of this sum of 40*l.* we waive all our claim for costs, and undertake not to appear at the bankrupt's public examination, nor to oppose his order of discharge." That was signed by the defendants. On the following day, it appears that the second sum of 20*l.* was paid, and a receipt was given by the defendants in these terms: "7th October, 1887. *Re* Clarke. Received of Mr. Kearley the further sum of 20*l.* mentioned in our receipt of yesterday." On the same October 7 the public examination of the bankrupt took place, and, in accordance with the stipulation in the letter of the 6th, at that public examination the defendants did not appear.

The tendency of such a bargain as that entered into between the plaintiff and the defendants is obviously to pervert the course of justice. Although the defendants were under no obligation to appear, they certainly were under an obligation not to contract themselves out of the opportunity of appearing. The case of *Hall v. Dyson* (17 Q. B. 785) was referred to in support of the suggestion that this agreement was illegal as interfering with the course of justice, and it was not argued that it was legal. I think, therefore, there can be no doubt the agreement must be taken to be illegal.

As a general rule, where the plaintiff cannot get at the money which he seeks to recover without showing the illegal contract, he cannot succeed. In such a case the usual rule is *potior est conditio possidentis*. There is another general rule which may be thus stated, that where there is a voluntary payment of money it cannot be recovered back. It follows in the present case that the

plaintiff who paid the 40*l.* cannot recover it back without showing the contract upon which it was paid, and when he shows that he shows an illegal contract. The general rule applicable to such a case is laid down in the very elaborate judgment in *Collins v. Blantern* (1 Sm. L. C. 7th ed. 369), where the Lord Chief Justice says: "Whoever is a party to an unlawful contract, if "he hath once paid the money stipulated to be paid "in pursuance thereof, he shall not have the help of "the Court to fetch it back again; you shall not have "a right of action when you come into a court of "justice in this unclean manner to recover it back." To that general rule there are undoubtedly several exceptions, or apparent exceptions. One of those is the case of oppressor and oppressed, in which case usually the oppressed party may recover the money back from the oppressor. In that class of cases the *delictum* is not par, and therefore the maxim does not apply. Again, there are other illegalities which arise where a statute has been intended to protect a class of persons, and the person seeking to recover is a member of the protected class. Instances of that description are familiar in the case of contracts void for usury under the old statutes, and other instances are to be found in the books under other statutes, which are, I believe, now repealed, such as those directed against lottery keepers. In these cases of oppressor and oppressed, or of a class protected by statute, the one may recover from the other, notwithstanding that both have been parties to the illegal contract.

There is suggested to us a third exception, which is relied on in the present case, and the authority of which is to be found in the judgment of the Court of Appeal in the case of Taylor v. Bowers (1 Q. B. D. 291). In that case Mellish, L. J., in delivering judgment, says at p. 300: "If money is paid, or goods "delivered for an illegal purpose, the person "who has so paid the money or delivered the

"goods may recover them back before the "illegal purpose is carried out." It is remarkable that this proposition is, as I believe, to be found in no earlier case than Taylor vs. Bowers (supra), which occurred in 1867, and, notwithstanding the very high authority of the learned judge who expressed the law in the terms which I have read, I cannot help saying, for myself, that I think the extent of the application of that principle, and even the principle itself, may, at some time hereafter, require consideration, if not in this Court, yet in a higher tribunal: and I am glad to find that in expressing that view I have the entire concurrence of the Lord Chief Justice. *But even assuming the exception to exist, does it apply to the present case? What is the condition of things if the illegal purpose has been carried into effect in a material part, but remains unperformed in another material part. As I have already pointed out in the present case the contract was that the defendants should not appear at the public examination of the bankrupt or at the application for an order of discharge.* **It was performed as regards the first; but the other application has not yet been made. Can it be contended that, if the illegal contract has been partly carried into effect and partly remains unperformed, the money can still be recovered? In my judgment it cannot be so contended with success.** *Let me put an illustration of the doctrine contended for, which was that partial performance did not prevent the recovery of the money. Suppose a payment of 100l. by A to B on a contract that the latter shall murder C and D. He has murdered C, but not D. Can the money be recovered back? In my opinion it cannot be. I think that case illustrates and determines the present one.*

I hold, therefore, that where there has been a partial carrying into effect of an illegal purpose in a substantial manner, it is impossible, though there remains something not performed, that the money paid under that illegal contract can be recovered back. We were pressed with the observations of the Master of the Rolls in Herman v. Jeuchner (15 Q. B. D. 561) where it was said that he had recognized the proposition that so long as the contract remained imperfectly performed the money could be recovered back. In my opinion, the language used by the Master of the Rolls does not bear that construction, because in that case the Court thought the contract had been fully performed, and, therefore, no doubt, in speaking of performance he spoke of full performance; but, whatever the construction of those words may be, I have, as I have already stated, the authority of the Master of the Rolls to state his concurrence with the view I have expressed with regard to the partial performance of an illegal contract.

For these reasons, I am of opinion the appeal fails, and should be dismissed accordingly.

Lord Coleridge, C. J. I agree.

Appeal dismissed.

[L. R. (1892) 2 Q. B. 724.]

IN THE COURT OF APPEAL.

Scott v. Brown, Doering, McNab & Co. Slaughter & May v. Brown, Doering, McNab & Co.

Illegality—Stock Exchange—Contract for Purchase of Shares—Agreement to buy shares at a fictitious Premium—Rigging the Market—Conspiracy—Action to recover Money paid on Purchase.

An agreement between two or more to purchase shares in a company in order to induce persons who might thereafter purchase shares in such company to believe, contrary to the fact, that there was a *bona fide* market for its shares, and that the shares were at a real premium, is an illegal transaction and may be made the subject of an indictment for conspiracy, and no action can be maintained in respect of such agreement or purchase of shares.

The plaintiff brought an action against the defendants who were stockbrokers, through whom he had purchased shares in a projected company, to obtain rescission of the contract for the purchase of such shares, and to recover back the purchase-money which he had paid in respect of them to the defendants, on the ground that the defendants, while acting as the plaintiff's brokers had delivered their own shares to him instead of purchasing them upon the Stock Exchange. At the trial it appeared upon the plaintiff's own case that the money sought to be recovered had been paid by the plaintiff in pursuance of an agreement between him and one of the defendants by which such defendant was with the money to purchase upon the Stock Exchange a number of shares in the projected company at a premium with the sole object of inducing the public to believe that there was a real market for the shares and that they were at a real premium, which in fact, as the plaintiffs and defendants well knew, they were not:

Held, that the action was based upon an illegal contract, and could not be maintained.

Applications for new trial.

1892. Aug. 1. LINDLEY, L. J. My brother Smith has written a judgment in this case, which I have read, and in which I concur. As, however, the case is one of great importance, I will add a few observations on it myself.

Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognized legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract, or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him. If authority is wanted for this proposition, it will be found in the well-known judgment of Lord MANSFIELD in *Holman v. Johnson* (Cowp. 343).

In this case the correspondence put in evidence by the plaintiff in support of the claim he made at the trial, shows conclusively that the sole object of the plaintiff in ordering shares to be bought for him at a premium was to impose upon and to deceive the public by leading the public to suppose that there were buyers of such shares at a premium on the Stock Exchange, when in fact there were none but himself. The plaintiff's purchase was an actual purchase, not a sham purchase; that is true, but it is also true that the sole object of the purchase was to cheat and mislead the public. Under these circumstances, the plaintiff must look elsewhere than to a court of justice for such assistance as he may require against the persons he employed to assist him in his fraud, if the claim to such assistance is based on his illegal contract. Any rights which he may have irrespective of his illegal contract will, of course, be recognized and enforced. But his

illegal contract confers no rights on him : see *Pearce* v. *Brooks* (Law Rep. 1 Ex. 213). The illegal purpose of the plaintiff distinguishes this case from *Wetherall* v. *Jones* (3 B. & Ad. 221) and others of a similar kind. I am quite aware that what the plaintiff has done is very commonly done ; it is done every day ; but this is immaterial. Picking pockets and various forms of cheating are common enough, and are nevertheless illegal. The plaintiff was not entitled to judgment in the Court below, and he has no right no a new trial.

LOPES, L. J. The defendants in both these actions are members of the London Stock Exchange. On December, 1890, they were brokers to a company called the Steam Loop Company, Limited. That company had issued a prospectus inviting subscriptions for its share capital, and the defendants had, previously to such issue, underwritten a part of such share capital, and were holders of a considerable number of shares in the company. The plaintiffs in the second action were solicitors to the company. The plaintiffs in both actions had instructed the defendants to purchase shares for them respectively in the company, and had duly paid for such shares. The plaintiffs in both actions sought to recover the price paid for such shares from the defendants upon the ground, amongst others, that instead of purchasing shares for them in the ordinary way, the defendants had transferred to the plaintiffs the defendants' own shares. The learned judge held that there was no evidence to go to the jury in support of the plaintiffs' case, and nonsuited them. In my judgment it is unnecessary to determine whether the holding of the learned judge is right in this respect. There is a preliminary matter to be considered, of which the learned judge might have taken, and this Court can and ought to take, judicial notice. The plaintiffs in both actions rely upon a contract contained in certain letters and telegrams passing between the plaintiffs and defendants, between December 6 and 9, 1890, and which are

as follows: (The Lord Justice then referred to the letters and telegrams, and continued:—) I have read these letters and telegrams to shew what the nature of the transaction was. In my judgment it was an agreement between the plaintiffs and defendants to induce would-be buyers of shares in this company, contrary to the fact, to believe there was a market for its shares and that the shares were of greater value than they really were. Putting it shortly—an agreement to cheat the public by leading them to believe the shares had a value, which the plaintiffs and defendants knew they had not, and thus inducing them to become purchasers. Is such a transaction illegal? I am of the opinion that it is, and might be made the subject of an indictment for conspiracy.

Rex v. Berenger (3 M. & S. 67) is an authority on this subject. It was an indictment for conspiracy by false rumors to raise the price of the public government funds with intent to injure those who should purchase, and ELLENBOROUGH, C. J., said (p. 72):—

"A public mischief is stated as the object of this conspiracy; the conspiracy is by false rumors to raise the price of the public funds and securities, and the crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete, although it had not been pursued to its consequences, or the parties had not been able to carry it into effect. The purpose itself is mischievous: it strikes at the price of a vendible commodity in the market, and if it gives it a fictitious price, by means of false rumors, it is a fraud levelled against all the public, for it is against all such as may possibly have anything to do with the funds on that particular day."

I can see no substantial distinction between false rumors and false and fictitious acts; the price of the shares in this case was artificial, and the premium unreal and nominal, to the knowledge of all parties concerned, put forward to induce the public to take shares with which otherwise they would have had nothing to do.

Again, in *Reg. v. Aspinall* (1 Q. B. D. 730; 2 Q. B. D. 48) it was held that an agreement to cheat and defraud by means of false pretences those who might buy shares, was an indictable offence. BRETT, L. J., said (2 Q. B. D. 59):

"If the second count in this indictment contains averments sufficiently stated which are enough to shew sufficiently that the defendants unlawfully—namely, with minds intending to do wrong—agreed by false pretences to cheat and defraud those who might buy shares in the company, it sufficiently alleges a criminal conspiracy."

I entertain no doubt that the agreement on which the plaintiffs rely is an illegal agreement. If the agreement is illegal, the question arises, whether the plaintiffs are not disentitled to recover, and whether they have not forfeited the relief which a court of law in other circumstances would have afforded them. *Begbie v. Phosphate Sewage Co.* (Law Rep. 10 Q. B. 491) is conclusive on this point. It was an action for money had and received, plea never indebted, and it was held that the plaintiff could not recover because he was aware that no exclusive right to use the process in question could be obtained, and had entered into the contract with the defendants in contemplation of a fraud upon the shareholders of the intended company. COCKBURN, C. J., said (p. 499):

"Another ground of defence insisted on is that the money having been paid for the purpose of defrauding the intended shareholders, by holding out to them the assurance of an exclusive right to use the process in question, as an inducement to contribute their money, when it was known to the parties engaged in getting up the new company that no exclusive right existed, or could be obtained, the plaintiff cannot maintain an action to recover back the money on the well-established principle that money paid in furtherance of a fraud or other unlawful purpose cannot be recovered back. * * * Under these circumstances we are

of opinion that the money sought to be recovered in this action having been paid in order to obtain from the defendants the agreement whereby this fraud could be carried out, the rule of law insisted on by the defendants applies, and is a bar to the plaintiff's right to recover. The case falls immediately within the principle of the decisions in *Simpson v. Bloss* (7 Taunt. 246); *Jones v. Yates* (9 B. & C. 532), and *Fivaz v. Nicholls* (2 C. B. 501). The plaintiff cannot present his case to a jury without necessarily disclosing the unlawful purpose in furtherance of which this money was paid."

Every word of that judgment applies. It is to be observed that the illegality of the contract was not pleaded. The point was taken by the Court and acted upon. The plaintiffs can not, and do not, in this case more than in that, present their case to the jury without necessarily disclosing the unlawful purpose in furtherance of which the contract was entered into. The plaintiffs, therefore, in my opinion, are disentitled to relief, and on this ground the appeal must be dismissed.

A. L. SMITH, L. J. The plaintiff Scott applies to the Court to set aside a nonsuit which passed against him at the Guildhall. **He asserts that there was evidence to go to the jury of his cause of action, which was for the rescission of a contract to purchase shares in a company about to be brought out and to be called the Steam Loop Company, and for the return of 632*l.* 3*s.* 5*d.*, paid thereunder to the defendants, upon the ground, amongst others, that the defendants, while acting as his brokers, had passed off their own shares to him instead of purchasing them upon the market.** It appeared upon the plaintiff's own case that the plaintiff and the defendant McNab were jointly interested with others in bringing out this company and in floating its shares upon the market, and that the 632*l.* 3s. 5d.

sought to be recovered in this action was paid by the plaintiff to the defendants in pursuance of an agreement come to between the plaintiff and the defendant McNab that McNab should therewith purchase 500 shares of the projected company, when brought out, at a premium (at the time of the agreement there was neither company nor market), the sole object of such purchase being that the public might thereby be induced to believe that there was a real market for the shares, and that they were at a real premium, whereas in truth and in fact, as the plaintiff and the defendant McNab well knew, they were not. Neither the plaintiff nor the defendants would raise the point of the illegality of the transaction at the trial, and my brother Wright, who tried the case, made some strong comment upon their conduct, but did nothing further in the matter.

If two or more persons agree to cheat and defraud others by means of deceit and fraud, there can be no doubt that each and all are indictable for a criminal conspiracy at common law. It has been held that it is a criminal conspiracy for two or more to agree by false rumors to endeavour to raise the price of the public funds on a particular day: *Rex v. Berenger* (3 M. & S. 67). It has also been held in *Reg. v. Aspinall* (1 Q. B. D. 730; 2 Q. B. D. 48) that an agreement by two or more to cheat and defraud by means of false pretences those who might buy shares in a company was an indictable conspiracy. False pretences here do not mean such false pretences as would support an indictment for obtaining money or goods by false pretences. See *Reg. v. Hudson* (Bell, C. C. 263). Lopes, L. J., has gone fully into the correspondence; but the telegram and letter of December 6, 1890, from the defendant McNab to the plaintiff, the letter of December 7, 1890, from the plaintiff to Slaughter, and of December 8, 1890, from Slaughter to McNab, in my judgment are sufficient. These documents contain conclusive proof that the plaintiff and McNab agreed together to cheat and defraud those who might buy shares in the com-

pany by leading them to believe that the shares were at a genuine premium in the market, whereas to their knowledge they were not, the fictitious premium being sought to be brought about by means of the purchases to be made with the plaintiff's 632*l.* 3s. 5d. by McNab, and which were to be made for the sole purpose of creating such fictitious premium. These documents were read by the plaintiff's counsel when he opened his case, as showing the purposes for which the plaintiff, and the defendant McNab, had agreed that the purchases should be made. The agreement between two or more to do an illegal act has been proved.

The next question is, Was it shown that the plaintiff and McNab agreed to carry out this intention by illegal means, viz., by deceit and fraud? For, if so, there can be no possible doubt that an indictable conspiracy has been committed viz., the agreement to do an illegal act by illegal means. It is not necessary in this case to discuss whether the whole of this must be proved to constitute an indictable conspiracy. It is said for the plaintiff that there was nothing deceitful or fraudulent in the fact of his paying his 632*l.* 3s. 5d. to McNab to purchase shares with upon the open market, and if that had been all I agree; but the question is, Was the payment made as it was for the sole purpose of creating therewith a fictitious premium, in order to induce the public to purchase shares in the company, and thereby benefit the plaintiff and McNab at the expense of the buyer, a deceitful and fraudulent means whereby to cheat and defraud those who might buy shares in the company?

I am of opinion that it was.

Test it in this way. Suppose a purchaser induced to purchase shares of the plaintiff or McNab by means of the fictitious premium created by them solely for the purpose of inducing such purchaser and others to buy, could he or not have successfully sued either or both for a false and fraudulent misrepresentation? I say that he could, and this is another way of stating the

same proposition—viz., that the plaintiff and McNab agreed by means of deceit and fraud to cheat and defraud the would-be purchasers of shares. The agreement to do an illegal act by illegal means is proved, and for the reasons above both the plaintiff and McNab were liable to be indicted for conspiring to cheat and defraud.

Now, how does the law stand upon the subject? If a plaintiff cannot maintain his cause of action without shewing, as part of such cause of action, that he has been guilty of illegality, then the Courts will not assist him in his cause of action. This was decided in Taylor v. Chester (Law Rep. 4 Q. B. 309) where the illegality was pleaded, and also in Begbie v. Phosphate Sewage Co. (Law Rep. 10 Q. B. 491), where it was not pleaded, but, the fraud being apparent, the Court would not interfere.

When the plaintiff's statement of claim is looked at it will be seen that he there states the purposes for which he handed the money to the defendants—viz., to "keep up the price of the shares," which upon the evidence was shewn to be "to create a fictitious premium."

In my judgment, the plaintiff, when suing the defendants for breach of contract, as he does, has to prove the whole contract, and it was not competent for him to put in evidence only half of the contract, and he did not do so, for the letters above read were opened by his learned counsel as part of his case. Immediately the whole contract upon which the plaintiff sues is put in, the illegality of the conduct of the plaintiff and of McNab at once becomes apparent. In my opinion the maxim "*In pari delicto potior est conditio possidentis*" applies, and this Court ought not to assist the plaintiff when he seeks to recover the 632*l.* 3s. 5d. back from the defendants. Upon these grounds, and without going further into the case, this appeal must be dismissed, and with costs.

Appeal dismissed.

[L. R. (1904) 1 K. B. 558.]

1904.

[In the Court of Appeals.]

Harse v. Pearl Life Assurance Company.

Insurance, Life—Contract—Illegality—Policy on the Life of Another—Absence of Insurable Interest—Recovery of Premiums—Life Assurance Act, 1774 (14 *Geo.* 3, *c.* 48), *ss.* 1, 2.

The agent of the defendants, an insurance company, in good faith and believing his statement to be true, represented to the plaintiff that an insurance effected by him on the life of his mother would be valid insurance, and the plaintiff, relying upon that representation, effected such an insurance and paid premiums thereunder. In an action to recover back the premiums :—

Held, that, assuming the policy to be illegal and void for want of an insurable interest, the representation having been innocently made by the agent, the parties were *in pari delicto*, and the premiums could not be recovered back.

Decision of the Divisional Court, [1903] 2 K. B. 92, upon this point reversed.

Appeal from the judgment of a Divisional Court, reported [1903] 2 K. B. 92, in favour of the plaintiff upon an appeal from a decision of the judge of the Oxford County Court.

It appeared from the county court judge's notes that in April, 1889, a proposal was made to the plaintiff, by an agent of the defendant insurance company, that he should effect an insurance with the defendants upon the life of a relative. The plaintiff agreed to insure the life of his mother, who was residing with him as his housekeeper, and to whom he made a money allowance. In the proposal form the pecuniary interest in the life insured was stated to be, "Son for funeral expenses." The plaintiff's father was alive, but he was paralyzed and unable to earn any money, and would not be in a

position, in the event of his wife predeceasing him, to pay for her funeral expenses. Subsequently the plaintiff was induced by the defendants' agent to effect a second policy with the defendants upon his mother's life. The proposal form of that policy was signed with the name of the mother, but the plaintiff stated that the policy was effected for his benefit, and the premiums were paid by him. The mother in giving her evidence denied that she had signed the proposal form.

In 1902 the plaintiff, being informed that the policies were void for want of insurable interest, brought the action in the Oxford County Court to recover the premiums paid by him under the two policies during the preceding twelve years, amounting to 43*l.* 8*s.* At the trial the judge left the following questions to the jury: "(1.) Had the person for whose benefit the assurance was really made a real pecuniary interest under either policy?—Yes. (2.) Did the agent in either case make a statement which was false in fact? If so, what was it?—No. (3.) Did the agent in either case know that what he was saying was untrue?—No. (4.) Was either policy, or were both, taken out in consequence of what the agent had said?—Yes. (5.) Did the agent in either case represent that the policy had been a good one?—Yes. (6.) Were the agents in what they did, or was either of them, guilty of any fraud, and, if so, in what respect?—No." The jury were unable to agree whether the mother signed the proposal form. The county court judge held as matter of law that under the circumstances the fact that the plaintiff would morally be bound to pay for his mother's funeral expenses, failing the ability of his father to pay for them, gave rise to a sufficient pecuniary interest to satisfy the statute of 14 Geo. 3, c. 48; that the first policy was consequently good, and the premiums paid under it could not be recovered back. He also held with regard to both policies that, even if they were void for want of insurable interest, the premiums could not be recovered back, for the parties were *in pari delicto*, the representation of the agent as

to the validity of the policies being a representation as to a matter of law, and having been innocently made. He accordingly gave judgment for the defendants. The plaintiff appealed.

The Divisional Court held that the fact that a person will at some future date be under a moral, though not a legal, obligation to pay for the funeral expenses of a relative is not sufficient to create an insurable interest in that relative's life; and, as to both policies, that, as the plaintiff was entitled to assume that the defendants' agent would have a knowledge of insurance law, the parties were not in pari delicto, and the premiums could consequently be recovered back.

Judgment was accordingly given for the plaintiff. (1)

The defendants appealed.

Sir E. Clarke, K. C., and *S. T. Evans, K. C. (J. J. Parfitt* with them), for the defendants. With regard to the first policy, it is submitted that the plaintiff had a sufficient insurable interest in his mother's life in respect of the reasonable probability under the circumstances that the expenses of her funeral would have to be defrayed by him: *Barnes* v. *London, Edinburgh and Glasgow Life Insurance Co.* (2). That decision also shews that the interest of the insurer need not be a pecuniary interest like that arising from the relation of debtor and creditor. The second policy appears on the face of it to be a valid policy taken out by the mother on her own life. The jury did not answer the question whether the signature on the proposal form was that of the mother or not. The onus of shewing that the policy was void lay on the plaintiff. But, assuming that both policies were void for illegality, the plaintiff is not entitled to recover the premiums paid by him. Where money is paid in pursuance of an illegal contract, primâ facie the payer cannot re-

(1) [1903] 2 K. B. 92.
(2) [1892] 1 Q. B. 864; 8 Times L. R. 143.

cover it, both parties being in pari delicto: *Howard* v. *Refuge Friendly Society.* (1) It was held in *British Workman's and General Assurance Co.* v. *Cunliffe* (2) that, where the agent of an insurance company had falsely represented that a policy would be valid, the premiums could be recovered; but in that case the agent knew that the representation was untrue, and was guilty of fraud in making it. In this case the jury have negatived any fraud on the part of the agent. Assuming that what the agent said in this case really amounted to a representation that the policy would be valid, it was an innocent representation on his part, and therefore cannot prevent the parties from being in pari delicto. Unless there is some misrepresentation of fact or some fraudulent misrepresentation of law by the agent, the premiums paid on an illegal contract of insurance cannot be recovered back, both parties being presumed to know the law. All that the plaintiff has established is an innocent misrepresentation on a question of law which is not sufficient to entitle him to recover the premiums: *West London Commercial Bank* v. *Kitson* (3) *Kearley* v. *Thomson* (4) and *Rashdall* v. *Ford.* (5)

Montague Shearman, K. C., and *Cecil Walsh* for the plaintiff. The plaintiff was making an allowance to his mother and not receiving one, and so the only question that arises as to interest on the first policy is whether the moral obligation to pay for her funeral expenses is sufficient. He would not be under any legal liability to pay them, and nothing short of that would create a sufficient interest to make the first

(1) (1886) 54 L. T. 644.
(2) (1902) 18 Times L. R. 425, 502.
(3) (1884) 13 Q. B. D. 360.
(4) (1890) 24 Q. B. D. 742.
(5) (1866) L. R. 2 Eq. 750.

policy good. The decision in *Barnes* v. *London, Edinburgh and Glasgow Life Insurance Co.* (1) was based on the fact that money had been actually expended in supporting the child, as is apparent from the judgments. As to the second policy, it was taken out, not by the mother, but by the plaintiff for his own benefit, and was void for want of an insurable interest, and, under s. 2 of the statute, for not disclosing the name of the person interested. As to both policies, the findings of the jury shew that the plaintiff paid the premiums in reliance on the statements of the agent of the company to the effect that the policies were legal. That was a representation of fact, and the plaintiff, relying on it, has paid the premiums without any consideration, and can recover them back. A representation as to the effect of a document was held in *West London Commercial Bank* v. *Kitson* (2) to be a representation of fact. If the representation is treated as made in respect of a matter of law, the parties were not on the same footing, for the plaintiff was entitled to assume that the defendants' agent had a knowledge of insurance law. It may be admitted that the ignorance of law on the part of the plaintiff would not, standing by itself, enable him to succeed in this action, but, when considered in relation to the fact that the parties were not dealing with the matter upon an equal footing, it is submitted that it will entitle him to recover back money paid under those circumstances. It is not a question between the plaintiff and the agent of the company, for the contract was made with the company, and it is their knowledge that is material. It was their representation, made through their agent, that there was an insurable interest, and if, with the knowledge that they have that there could be no insurable interest, they instruct their agent to make a representation to the contrary effect, the position of the parties is not equal.

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(1) 1 Q. B. 864; 8 Times L. R. 143.
(2) (1884) 13 Q. B. D. 360.

COLLINS M. R. This is an appeal from a decision of a Divisional Court. It appears that the plaintiff effected with the defendants through their agent two insurances on the life of his mother. He continued to pay the premiums for some years till they came to more than the amount insured, and now seeks to recover them back. Dealing with the first policy in point of time, and assuming, though without deciding the matter, that the plaintiff had not a sufficient insurable interest in his mother's life to entitle him to take out a policy with regard to her funeral expenses, there remains the question of his claim to recover the premiums that he has paid. The ground on which the claim is based is that there has been a total failure of consideration, and that depends on the hypothesis that I have adopted of the illegality of the first transaction under the statute of 14 Geo. 3, c. 48; for if the plaintiff had been under any liability to pay the funeral expenses of his mother, the policy would be valid, and the premiums could not be recovered back. On the assumption that the policy was illegal, the plaintiff has paid money to the defendants upon an illegal bargain, and the question is whether he can recover it back. As to the other policy, the plaintiff effected it, on his own shewing, in his own interest. The jury have found as to both policies, in answer to questions 4 and 5 put to them by the county court judge, that they were taken out in consequence of the representation of an agent of the defendants that they were good policies, but that the agent was not guilty of any fraud. The county court judge held that even if both policies were void for want of insurable interest, the representations having been innocently made, the premiums could not be recovered back. It is clear law that where one of two parties to an illegal contract pays money to the other, in pursuance of the contract, it cannot be recovered back. That rule was applied to a case similar to the second of these policies in *Howard* v. *Refuge Friendly*

Society. (1) We therefore begin the discussion with the rule of law that *prima facie* the plaintiff would be debarred from recovering the premiums paid on either policy. In this state of things it is said that what occurred between the plaintiff and the company's agent relieves the plaintiff from the operation of that rule. The statement, however, made by the agent was not a statement of fact, but one of the law, and was made innocently, as the jury have found. Unless there can be introduced the element of fraud, duress, or oppression, or difference in the position of the parties which created a fiduciary relationship to the plaintiff so as to make it inequitable for the defendants to insist on the bargain that they had made with the plaintiff, he is in the position of a person who has made an illegal contract and has sustained a loss in consequence of a misstatement of law, and must submit to that loss. Neither on the findings of the jury nor in the evidence can I find anything that brings the case within any of the classes that I have indicated. Under those circumstances the plaintiff cannot recover back the premiums that he has paid. We have the clear authority of this Court in *British Workman's and General Assurance Co.* v. *Cunliffe* (2) In that case the decision of the Divisional Court was that the money could be recovered back where a person had paid premiums on the statement of an agent that the policy would be valid. This Court affirmed the decision that the money could be recovered, but did so expressly on the ground that the statement on which the assured acted was fraudulently made. This Court to that extent qualified, or at the least did not adopt, the ground of the judgment of the Court below. On the general law and on authority the plaintiff, in my opinion, has failed to establish his right to a return of the premiums, and the appeal must be allowed.

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(1) 54 L. T. 644.
(2) 18 Times L. R. 425, 502.

ROMER L. J. I am of the same opinion. Assuming that the two policies are void because they were illegal, it is clear that the plaintiff cannot recover the premiums that he has paid unless he can make out that he is not *in pari delicto* with the defendant company. Can he be said to have established that position? To do this reliance is placed on the statements made by the agent of the company. *In my opinion there was no misstatement of fact, and it is further clear that there was no fraud—that it was not a case of oppression or duress, and that it was not a case of an advantage taken by a clever man over an ignorant one. The agent, like the plaintiff, had forgotten or mistaken the law. The finding of the jury amounts to this—that the agent had the belief that the policies were good.* **Unless it can be said that the statements made by the agent put the defendants in a worse position than the plaintiff, the parties were on an equal footing with regard to the transaction.** I do not think the statement had that effect, nor do I think that agents of insurance companies must be treated as under a greater obligation to know the law than ordinary persons whom they approach in order to effect insurances. It appears to me that the parties must be taken to have been in *pari delicto*, and that the company cannot stand in a worse position than their agent. I agree, therefore, that the appeal should be allowed.

MATHEW L. J. concurred.

Appeal allowed.

Solicitors for plaintiff: *Esson & Mallam, for George Mallam & Son, Oxford.*

Solicitor for defendants: *J. M. Storer, for E. T. Hatt, Oxford.*

A. M.

[73 Ala. 200 : 49 Am. Rep. 48.]

1882.

Hill v. Freeman.

Deed—consideration—illicit intercourse.—A deed executed and delivered in consideration of future illicit intercourse, the grantees being in possession, vests title.

Ejectment. The opinion shows the point.
Heflin, Bowden & Knox, for appellants.
G. C. Ellis and *Bradford & Bishop, contra.*

SOMERVILLE, J.—We understand it to be a first principle, not now to be assailed or even doubted, that where a contract, based on a consideration contrary to law, immoral, or opposed to public policy, has been fully and voluntarily executed, if the parties are *in pari delicto*, the courts will not interfere to disturb the acquired rights of either at the instance of the other. The result is the same as if the contract had originally been legal and valid, and neither can recover the consideration which he has thus voluntarily parted with. Bish. Cont. Sec. 140, 432 ; *Morris v. Hall*, 41 Ala. 510, 536 ; *Boyd v. Barclay*, 1 *id.* 34 ; *Black v. Oliver*, *id.* 449 ; *Jacobs v. Stokes*, 12 Mich. 381 ; *Burt v. Place*, 6 Cow. 431 ; *Liness v. Hesing*, 44 Ill. 113 ; 1 Story Cont., Sec. 543 ; 1 Add. Cont., Sec. 303 ; *Williams v. Higgins*, 69 Ala. 517.

It is of course settled that all illegal executory contracts are void, and no court will permit its aid to be invoked for their enforcement. Bish. Cont., Sec. 458 ; 1 Add. Cont., Sec. 251 *et seq.* ; *Ware v. Jones*, 61 Ala. 288. In *Shiffner v. Gordon*, 12 East, 304, Lord ELLENBOROUGH declared it to be a settled rule that "when a contract which is illegal remains to be executed, the court will not assist either party in an action to recover for the non-execution of it."

The present case manifestly falls within the first

principle above enunciated. It is that of an executed contract in which nothing remained to be done by either party. Conceding that the deed from John Hill to the appellee was executed in consideration that one of the grantees would live with him in a future state of illicit intercourse or concubinage, *the title of the land conveyed nevertheless passed to the grantees*, and being in possession under their deed, they cannot be dispossessed by the heirs of Hill, who can have no greater claim or right than the deceased grantor had. It is plain that such a contract, if unexecuted, could not be enforced in any court. Such was the ruling of this court in *Walker v. Gregory*, 36 Ala. 180. But the deed being executed and delivered, and the grantees being in possession, ejectment will not then lie to disposses them. The maxim applies, *in pari delicto potior est conditio possidentis.*

There was no error in excluding the evidence offered by appellants, as the illegality of the consideration upon which the deed was based was immaterial.

The judgment is affirmed.
Judgment affirmed.

[108 Ala. 299: 19 So. 382.]

Thornhill v. O'Rear.

(Supreme Court of Alabama. Jan. 16, 1896.)

Executed Contracts—Illegality—Recovery of Consideration—Wages.

1. One Sunday plaintiff said that "he believed he would raffle off his dwelling house and lot." Defendant said he would take all the chances, and the parties thereupon contracted for the transfer of the property the next day, and put up their watches in the hands of another as a pledge to stand by the proposition. Plaintiff defaulted, and permitted his watch the next day to be delivered to defendant as a forfeit. *Held*, that *the contract became executed by the delivery of the watches*, and being void under the Sunday law (Code. Sec. 1749), and the parties being *in pari delicto*, plaintiff could not recover his watch in detinue.

2. In such case the putting up of the watches was only a pledge of the good faith of the parties to abide the terms of the agreement, and was not a wager.

Appeal from circuit court, Walker County; J. H. McGuire, Special Judge.

This was a statutory action of detinue, brought by the appellant, W. L. Thornhill, against the appellee, Martin O'Rear, to recover the possession of a gold watch. The defendant pleaded the general issue, and upon this plea issue was joined. The facts of the case, and the respective contentions of the plaintiff and the defendant, are sufficiently stated in the opinion.

The plaintiff requested the court to give to the jury the following written charge, and duly excepted to the court's refusal to give the same as asked: (1) "If the "jury believe the evidence they must find for the "plaintiff." At the request of the defendant the court gave to the jury the following written charges, and to the giving of each of them the plaintiff separately excepted: (2) "If the jury believe from the evidence

" that on Monday Thornhill consented that Jim " O'Rear should deliver the watch to Martin O'Rear " and Jim O'Rear did then and there deliver the watch " to Martin O'Rear, then their verdict must be for the " defendant." (3) " Unless the jury believe from the " evidence that Thornhill instructed J. A. O'Rear not " to deliver the watch to Martin O'Rear they will find " for defendant."

There were verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the refusal to give the general affirmative charge requested by him, and the giving of the charges requested by the defendant. Affirmed.

T. L. Sowell, for appellant. Coleman & Bankhead, for appellee.

HARALSON, J. All the authorities hold, if money or property be placed in the hands of a stakeholder, to abide the result of a bet, or as a forfeit to bind parties to an illegal contract while it remains in his hands, it may be arrested by the bailor before or after the happening of the event upon which the money is to be paid or the forfeiture depends. While in his hands, it is *in transitu*. He is not a party to the illegal contract, and upon the revocation of his authority, the money or property remains in his hands as a naked trustee for the parties who placed it there. *Wood v. Duncan*, 9 Port. (Ala.) 227; *Shackleford v. Ward*, 3 Ala. 37; *Lewis v. Bruton*, 74 Ala. 317; *Ball v. Gilbert*, 12 Metc. (Mass.) 403; *Fisher v. Hildreth*, 117 Mass. 558; *Vischer v. Yates*, 11 Johns, 25.

But, as was announced in *McKee v. Manice*, 11 Cush. 358, " the law seems to have been held, by the author- " ities, that if after the event is determined, the loser " pays the money to the winner, or permits by his as- " sent or silence, the stakeholder, into whose hands the " same has been placed, to pay it over to the winner, " the loser cannot recover back the same. In such " case, the principle is applied, that the law will re- " fuse its aid to restore the money to the loser, both " parties being *in pari delicto*."

In *Vischer v. Yates*, 11 Johns. 25, it was said by KENT, C. J.: "If, after the determination of the event "against the plaintiff, the money has been actually paid "over to the winner with the plaintiff's consent, or "perhaps without notice to the defendant to the con- "trary, the plaintiff could not have sustained an action "against the winner to recover back the deposit;" citing *Howson v. Hancock*, 8 Term R. 575, in which Lord KENYON said, that there is no case to be found where an action has been maintained to recover the money back again.

All the decisions of this court are in line with these authorities, holding, as to suits upon executory contracts founded upon immoral or illegal considerations, they may always be defended on the ground of their invalidity; but that when executed, unless controlled by statute to the contrary, the law will not interfere, at the instance of either party to undo that which it was originally unlawful to do, for the reason, that being equally at fault, the law will help neither. *Long v. Railway Co.*, 91 Ala. 522, 8 South. 706, and authorities there collected.

Section 1742 of our Code provides, that all contracts founded in whole or in part on a gambling consideration are void; and any person who has paid any money or delivered anything of value, lost upon any game or wager, may recover such money, thing or its value, by action commenced within six months from the time of such payment or delivery. If the case before us falls within the influence of that statute, it would be an exception to the rule as to executed contracts to which we have just referred. *Samuels v. Ainsworth*, 13 Ala. 366. The facts are, that on Sunday morning, being in the presence of defendant and others, when the subject of raffling came up, the plaintiff stated, that "he believed he would raffle off his dwelling house and lot by chances," stating the proposed scheme, the chances to be 500, at a specified valuation. The defendant said he would take all the chances, to which plaintiff assented, and said he would make out a deed

to the house and lot the next day, and deliver it to defendent, when he could pay him the money for it. Both parties agreed at the same time, to put up their watches in the hands of a stakeholder, as a forfeit, to stand by the proposition as made and accepted, which was done. This statement of facts shows that all the elements of chance were eliminated from the contract, which resulted in being nothing more than an offer by one party to sell the house and lot at a certain price, to be arrived at by calculation, and the acceptance of the offer by the other. There was nothing unlawful in this offer, as made and accepted, if it had been done on any other day than Sunday, but having been made on that day, it was void, and incapable of enforcement. Code, Sec. 1749.

But this suit arises outside the contract of the sale and purchase of the house and lot, namely, out of the transaction of putting up the watches to secure the fulfillment of this contract. It is said this was a bet or wager, which brings the case under the influence of said section 1742 of the Code. As to this, let us see. A wager is nothing more than a bet, "by which two parties agree that a certain sum of money, or other thing shall be paid or delivered to one of them on the happening or not happening of an uncertain event." 2 Bouv. Dict. "Wager." The transaction of putting up the watches was not a wager. It was only a pledge of the good faith of the parties to abide the terms of the agreement, in the shape of liquidated damages for a failure of either to perform his agreement. *Keeble v. Keeble*, 85 Ala. 552, 5 South. 149. If the transaction had occurred on any day but Sunday, the idea of gambling, perhaps, would not have occurred to any one. This suit, it will be borne in mind, is not on the contract. It is in detinue by the plaintiff, who receded from the bargain, against the defendant, who stood by it, and to whom plaintiff's watch, put up as a forfeit, had been delivered. The evidence of plaintiff tended to show, that on Sunday, the day of the transaction, shortly after it

occurred, he notified the stakeholder, that he would not stand by the proposition, and not to deliver the watch to defendant; that he demanded the watch from the stakeholder, before he delivered it to defendant, and did not authorize him to deliver it to him; and that on Monday or Tuesday following, plaintiff told defendant he would not abide the proposition made on Sunday before, and wanted his watch, which defendant refused to deliver to him. On the part of defendant it was shown, that plaintiff did not notify him of his intention not to abide the transaction of Sunday, until after the watch had been delivered to him by the stakeholder, and further, that the next day, Monday, plaintiff told the stakeholder, it was defendant's watch, and to turn it over to him, which he accordingly did, and that after he had turned it over to defendant, plaintiff told the stakeholder not to give it to defendant, when he notified him, that he had already turned it over to him.

The attempt of plaintiff here is, to recover this property, because the agreement of forfeiture was entered into on Sunday. It could not, as we have shown, have reference to any illegality growing out of the proposed raffle, which was afterwards abandoned. The condition on which the forfeit was to be delivered to defendant, had taken place. No delivery was made on Sunday, but on Monday or Tuesday following, and thereby, as between the parties to the transaction, it became executed. Whatever element of illegality, if any there may have been in putting up the forfeiture, in the beginning, on Sunday, the plaintiff was as much to blame for, as defendant, and if the watch was delivered according to the terms of the agreement of forfeiture, that agreement became executed, and plaintiff, in a suit in detinue for the property itself, is in no condition to ask the law to reclaim it from the predicament in which he contributed to place it.

It is only in suits on contracts, void under the statute for having been made on Sunday, that the defense of invalidity for having been executed on that day, can be made, if the contract remains unexecuted. If one buy a horse on Sunday, and it is delivered and paid for, it could hardly be contended that either party could sue the other, the one for the horse, or the other for the money he paid for it, because the transaction occurred on Sunday. *Black v. Oliver*, 1 Ala. 450; *Windham v. Childress*, 7 Ala. 357; *Walker v. Gregory*, 36 Ala. 184; *Morris v. Hall*, 41 Ala. 536; *Long v. Railway Co.*, 91 Ala. 522, 8 South. 706. If this suit had been brought in proper form against the stakeholder, and the proof showed that he was notified not to deliver the watch before he did so, a case different from the one we now have, would be presented.

It follows from what we have said, that under the evidence in this case, the plaintiff was not entitled to the general charge as requested. Nor was there any error, of which plaintiff can complain, in giving those charges requested for defendant. Affirmed.

[45 S. E. 262.]

Watkins et al. v. Nugen.

(Supreme Court of Georgia. Aug. 11, 1903.)

Deed—What Constitutes—Executed Contract—Illegal Consideration.

1. The instrument involved in this case was a deed, and not a will.
2. A court of equity will not lend its aid to either party to an executed contract founded upon an immoral or illegal consideration.
3. A deed becomes an executed contract when signed and delivered. It is not essential that possession should be obtained under it.
4. A deed executed and delivered in consideration of a promise to do an immoral or illegal thing is not a gift, but an executed contract founded upon a consideration.

(Syllabus by the Court).

Error from Superior Court, Richmond County; *E. L. Brinson*, Judge.

Action by Robert S. Watkins and others against Eliza Nugen. Judgment for defendant, and plaintiffs bring error. Affirmed.

W. K. Miller, for plaintiffs in error. *Salem Dutcher*, for defendant in error.

COBB, J. This was a suit by Robert S. Watkins and others, claiming to be heirs at law of Wilson Watkins, deceased, to recover from Eliza Nugen a tract of land of which the defendant was alleged to be in possession. According to the allegations of the petition, Wilson Watkins died in 1902, and in 1897 executed a paper conveying to the defendant certain described property, to be held by her "after the expiration of the life estate herein reserved in fee simple forever." This instrument was in the form of a deed, and executed as such. It was made in consideration of the payment of $10 "and in considera-

tion of [the grantor's] interest in the said party of the second part." The paper was duly recorded. It is alleged that the paper is void: (1) Because it is in fact a will, and not properly executed as such. (2) Because it was the result of fraudulent imposition upon the grantor by the defendant, who induced him to believe that the document was a will, and not a deed, and was of no effect whatever until after his death; that it provided for her only in case she survived him and that, notwithstanding the execution of the paper, the grantor would still own the property absolutely. (3) Because the conveyance is founded upon, and is the result of, an agreement to do an immoral and illegal thing, to wit, an agreement on the part of the defendant, a married woman, to live *contra bonos mores* and in open defiance of all public decency and law, in illicit relations for life with the grantor. The petition alleges that the defendant had been living in such relations with Watkins for several years prior to the execution of the paper, and that he was induced to sign the paper on account of representations of the defendant that unless he did so she would cease to continue illegal intercourse with him and that the document was intended to provide for the continuance of further illegal and illicit relations between them, which relations were in consequence thereof kept up by her and him to the time of his death. The petition further alleges that, by reason of the confidential relations existing between the defendant and Watkins, if any title passed under the conveyance, the same is held in trust for the use of plaintiffs as heirs at law. The prayers were for injunction, cancellation, etc. The court dismissed the petition on demurrer at the hearing, and plaintiffs excepted.

1. The paper executed by Watkins was not a will, but a deed conveying the property *in præsenti*, with right of possession postponed until his death. *West v. Wright*, 115 Ga. 277, 41 S. E. 602.

2, 3. It is as well settled as any proposition can be that neither a court of law nor a court of equity will lend its aid to either party to a contract founded upon

an illegal or immoral consideration. If the contract is executed, it will be left to stand. If it be executory, neither party can enforce it. *Howell v. Fountain*, 3 Ga. 176, 46 Am. Dec. 415; *Adams v. Barrett*, 5 Ga. 404; *Peacock v. Terry*, 9 Ga. 137–147; *White v. Crew*, 16 Ga. 416; *Ralston v. Boady*, 20 Ga. 449; *Bailey v. Milner*, 35 Ga. 330; Fed. Cas. No. 740; *Bugg v. Towner*, 41 Ga. 315; *Thompson v. Cummings*, 68 Ga. 125 (2). In such a case one claiming under a party to the contract as legal representative or heir stands in no better position than the party himself, and the courts will afford him no relief. See *McCleskey v. Leadbetter*, 1 Ga. 551; *Crosby v. DeGraffenreid*, 19 Ga. 290; *Beale v. Hall*, 22 Ga. 432 (8); *Edwards v. Kilpatrick*, 70 Ga. 328. It is argued, however, that a court of equity will interpose to prevent the enforcement of an executory contract founded upon an alleged or immoral consideration, and that the contract involved in this case was executory. It is contended that a deed does not become an executed contract until possession is obtained under it. Even if counsel's premise be conceded, we do not agree to his conclusion. There is no such thing in Georgia as livery of seisin. A deed is executed by signing and delivery. As was said in *Adams v. Barrett*, 5 Ga. 415, "the old doctrine of corporal investiture, etc., has no force now, and a deed is a seisin in law. A deed is a contract executed. Even if not recorded, it passes the title as against the grantor, his heirs and devisees." The petition in the present case, does not, in terms, allege that the deed was ever delivered, but this is to be inferred from the allegations. In the copy attached to the petition, the deed purports to have been delivered, and it is alleged that it was recorded, and from this a presumption of delivery would arise. See *Ross v. Campbell*, 73 Ga. 309; *Gordon v. Trimmier*, 91 Ga. 472, 18 S. E. 404; *Bourquin v. Bourquin*, 110 Ga. 446, 35 S. E. 710. "An executed contract is one in which all the parties thereto have performed all the obligations which they have originally assumed. An execu-

tory contract is one in which something remains to be done by one or more parties." Civ. Code, § 3632. It is expressly alleged in the petition that the defendant is in possession of the land, and that prior to the death of the grantor she performed her part of the contract. The contract was therefore completely executed when the suit was brought, if not before. By the express terms of the deed, possession by the grantee was postponed until after the termination of the life estate, and under the allegation of the petition, the defendant acquired possession at the earliest moment after the right to do so accrued. Where a deed is executed and delivered in consideration of future illicit intercourse, and the grantee acquires possession under it, neither the grantor nor his heirs can recover the land. *Hill v. Freeman*, 73 Ala. 200, 49 Am. Rep. 48, and notes. See, also, 2 Devlin on Deeds (2d Ed.) § 809.

The allegations as to fraud are too loose and general, even if a court would interpose on this ground to prevent the enforcement of an executed contract based on an agreement to do an immoral thing. It is not alleged what means were used to deceive the grantor, nor how he was induced to believe that the contract was not an absolute conveyance. No contract would be set aside on allegations so general as these.

4. Section 3573 of the Civil Code has no application to such a state of facts as is presented by this petition. That section provides: "If a gift be made for a specific purpose, express, or secretly understood, and such purpose is illegal, or from other cause fails or cannot be accomplished, the donee shall hold as trustee for the donor or his next of kin." Without undertaking to trace the history of this section, it is sufficient to say that the transaction involved in this case was not a gift. There can be no such thing as a gift founded upon a consideration. Thorn. Gifts, p. 3; Bisp. Prin. Eq. (6 Ed.) § 66. There may be a gift for an immoral purpose but a contract based

on an illegal consideration is not a gift. Thorn. Gifts § 119 p. 95. The deed now under consideration is not a gift, but an executed contract founded upon an illegal and immoral consideration. As was said by the able counsel for the defendant in error in his brief, "it is a conveyance upon the set consideration of a vested remainder in consideration of concubinage for life--so much land for so much lust." There was no error in dismissing the petition.

Judgment affirmed. All the Justices concur, except TURNER, J., not presiding.

[114 Ind. 80 ; 15 N. E. 804.]

Hutchins v. Weldin.

(Supreme Court of Indiana. March 8, 1888.)

Appeal from circuit court, Stuben county ; R. Wes. McBride, Judge.

Action of replevin, brought by Nelson Hutchins against Leander F. Weldin. Verdict and judgment for defendant, and plaintiff's motion for a new trial overruled. Plaintiff appeals.

Woodhull & Brown, for appellant. *Somers & Roby*, for appellee.

Howk, J. This was an action of replevin brought by appellant, Hutchins, as plaintiff against appellee, Weldin, as defendant, to recover the possession of one dark bay mare, of the value of $50, of which mare plaintiff alleged he was the owner, and entitled to the possession, and that defendant had possession of such mare without right, and unlawfully detained the same from plaintiff. The cause was put at issue, and tried by a jury, and a verdict was returned for defendant, and, over plaintiff's motion for a new trial, judgment was rendered on the verdict. Plaintiff appeals to this court, and assigns here as error the overruling below of his motion for a new trial. In this motion a number of causes were assigned for such new trial, but the causes chiefly relied upon here by plaintiff's learned counsel for the reversal of the judgment below are alleged errors of law occurring at the trial in giving the jury at defendant's request, the following instructions, to-wit: "(3) It is a principle of law that a man who "takes an active part in leading others into error cannot "ask that the consequences of his mistake be thrown on "others. It is also a well settled principle of law "that when an act is done, or a statement made, by a "person, which if denied by him would work an in-

"jury to others whose conduct had been influenced by "the act or statement, the character of an estoppel "attaches, and he will not be allowed to make such "denial. (4) If the contract of sale under which this "property is claimed is void, it is because it is con- "trary to public policy. It is therefore subject to "all the limitations which sound public policy may "dictate ; and courts will treat such contract in the "manner which will be most consistent with sound "public policy, and best calculated to suppress and "discourage such violations of law. One qualification "of the rule is that the rule itself shall not be made "an engine of wrong and injury in the hands of a "wrongdoer against an innocent party. It can never "be good policy to punish the innocent for the crimes "of the guilty. Hence the rule cannot be set up to "the prejudice of any party innocent of all participa- "tion in the wrong, or whose rights have been ac- "quired without notice of it ; and it is a well-settled "principle of law that where goods are obtained by "fraud or under fraud, or under circumstances which "would render the sale void between the vendor and "vendee, and the vendor has furnished, however inno- "cently, to the vendee, any of the evidences of owner- "ship calculated to mislead a purchaser, and the "goods are purchased *bona fide* from the fraudulent "vendee, relying upon such evidences of ownership, "such innocent purchaser will hold as against the "original vendor."

Appellant's counsel contend, as we understand their argument, that the judgment below should be reversed, and a new trial granted, because, they say, the instructions quoted were wholly inapplicable to the evidence and the issues of the case, and tended to mislead and confuse the jury, and to prejudice them against the appellant. Counsel do not claim that these instructions, considered merely as abstract legal propositions, were erroneous ; but they say, substantially, that, although correct principles of law may be enunciated therein, both instructions were

foreign to the issues in the cause, and had no application whatever to the case made by the evidence. We do not agree, however, with the views of plaintiff's counsel in regard to the facts of this case. Plaintiff claimed that he was the owner, and entitled to the possession of the property, described in his complaint, and, further, that defendant had possession of such property without right, and unlawfully detained the same from plaintiff. Of course, plaintiff had the burden of establishing, by sufficient evidence, his claim to the property in controversy. We have carefully examined and considered all the evidence appearing in the record. The evidence is in much conflict, it is true, on some of the questions at issue between the parties; but, while this is so, it cannot be denied that there was evidence before the jury, which, if believed, authorized them to find that the plaintiff herein, by an executed contract of his own seeking and making, had parted with his title to, and right to the possession of, the mare in controversy to one Jacob Whetstone, before the commencement of this action. We need not state what this contract was, as shown by the evidence, further than to say that it was fully executed by both the parties thereto, and plaintiff got all the consideration for the mare he bargained for. But the contract was *contra bonos mores*, and void as against public policy. *Root v. Stevenson's Adm'r.* 24 Ind. 115; *Dumont v. Dufore*, 27 Ind. 263; *Davis v. Leonard*, 69 Ind. 213. Upon this point, the court of its own motion charged the jury, in effect, that, if they believed from the evidence that such contract was executed by the delivery of the mare to Whetstone after he had complied with the terms of plaintiff's proposal, "the law, in such a case, will leave the parties just where it finds them. * * * If the contract has not been executed, it will not be enforced; if it has been executed, the law will not extend relief." Where a contract, void as against sound morals or public policy, has been fully executed by both parties, and suit brought under, upon, or against such contract, "*potior est conditio defendentis.*"

We are of opinion that the instructions of the court given at defendant's request, when construed in connection with those given of the court's own motion, as an entirety,—as they must be, under our decisions,—could not, and did not, mislead or confuse the jury, nor prejudice them against the plaintiff, and they were certainly applicable to some of the phases of the case as presented by the evidence. When all the instructions given are considered with reference to each other and as an entirety, it will be found that they presented to the jury a correct statement of the law applicable to this case, fair alike to plaintiff and defendant, and were not calculated to mislead the jury. In such case, as we have often decided, the judgment below will not be reversed because of mere inaccuracies or loose expressions in any of the instructions, separately considered. *Deig v. Morehead*, 110 Ind. 451, 11 N. E. Rep. 458, and cases there cited.

The motion for a new trial was correctly overruled. The judgment is affirmed, with costs.

[55 Iowa, 674 : 8 N. W. 656].

Kinney vs. McDermott.

[Filed April 20, 1881.]

Plaintiff and defendant made a horse trade on Sunday, defendant leaving his horse with plaintiff, and taking the horse of plaintiff with him. A day or so later defendant, without plaintiff's knowledge, returned the horse of plaintiff he had received and took his own from plaintiff's stable. *Held*, that as the original contract was an unlawful one, the court would render no aid to either, and as plaintiff's possession was *prima facie* evidence of ownership, he might, on the strength of that possession, and the trespass of defendant, maintain replevin for the horse so taken away by defendant.

Appeal from Buena Vista circuit court.

This is an action of replevin, and the amount in controversy is less than $100. There was a trial by jury. There was a conflict in the evidence. The court instructed the jury to return a verdict for the plaintiff. Defendant appeals.

H. W. Weeden, Wm. Wart, and Robinson & Milchrist, for appellant. C. D. Goldsmith, for appellee.

ROTHROCK, J. The trial judge made the following certificate, upon which we are authorized, under the statute, to entertain the appeal:

"(1) On Sunday plaintiff agreed with defendant, at the house of the latter, to give defendant a horse and $25 in exchange for a horse of defendant. This was consented to, and on the same day, pursuant to said agreement, plaintiff left his horse with defendant, and took the horse of the latter away. *The money was to be paid the following Sunday* at the house of plaintiff. On Tuesday, following the exchange, defendant, in the absence of plaintiff, and without his knowledge or consent, returned to the stable of the latter the horse received of him, and took the horse he let plaintiff have away. A day or two later plaintiff replevied the horse

so taken, and has since kept both horses, using the one returned by defendant, and not offering to return either horse or money. Under these facts can the plaintiff recover in his action of replevin? "

"(2) Under the facts hereinbefore stated, can plaintiff recover in replevin when his alleged right of possession, under the issues made in the pleading, depends upon the ownership of the property?"

"(3) Is the plaintiff entitled to recover under the issues in this action, and the facts as stated above?"

A contract made and concluded on Sunday cannot be enforced by action. *Pike v. King*, 16 Iowa, 50. It is illegal, and the law in such cases will leave the parties where it finds them, or rather where they have placed themselves. If one party sells property to another on Sunday, and delivers it, no action will lie for the price agreed to be paid therefor. *Pike v. King*, *supra*.

If the defendant in this action had brought replevin for the horse, instead of taking him by force he would have been defeated, because he would have been obliged to introduce evidence to overcome the presumption arising from plaintiff's possession. By the acts of the parties in violation of law the plaintiff became entitled to the possession of the horse. This possession was such that the defendant could not have recovered by action the price, if sold and not paid for, and could not maintain an action of replevin. He, however, wrongfully and by a trespass, deprived the plaintiff of the possession. The question is, will he be allowed to recover by force what the law would not have aided him to recover peaceably? It is insisted by counsel for appellant that, because the plaintiff claims title to the horse, he was bound to introduce evidence of such title, and could only do so by showing the Sunday contract. But, according to the certificate of the trial judge, the plaintiff was in possession, and the defendant, by force, and without the knowledge

of the plaintiff, removed the horse from plaintiff's stable. The question is, by what right did the defendant possess himself of the horse? The burden was on him to show his right. In doing so he would necessarily be compelled to introduce the Sunday contract in evidence.

In *Smith v. Bean*, 15 N. H. 577, referring to a contract of sale made on Sunday, it is said:

"The transaction being illegal, the law leaves the parties to suffer the consequences of their illegal acts. The contract is void so far as it is attempted to be made the foundation of legal proceedings. The law will not interfere to assist the vender to recover the price. The contract is void for any such purpose. It will not sustain an action by the vendee upon any warranty or fraud in the sale. It is void in that respect. The principle shows that the law will not aid the vendor to recover possession of the property if he has parted with it. The vendee has the possession as of his own property by the assent of the vendor, and the law leaves the parties where it finds them. If the vendor should attempt to retake the property without process, the law, finding that the vendee had a possession which could not be controverted, would give a remedy for the violation of that possession."

See also, 2 *Parsons on Contracts*, 764, and notes. The author admits there is some conflict of authority upon the question whether a vendee will be allowed to retain the property without paying the price. In our opinion he should, upon the ground that the law will leave the parties where it finds them. It was held in *Pike v. King*, *supra*, that the plaintiff could not recover the value of the property aside from the price agreed upon, or, in other words, could not recover upon the *quatum valebat*.

Affirmed.

[81 Iowa, 339: 46 N. W. 1003.]

McIntosh v. Wilson, Sheriff.

(Supreme Court of Iowa. October 24, 1890.)

Fraudulent Conveyances—Rights of Creditors—Illegal Contracts.

1. A transfer by the son of his interest in a drug-store to his father, the son remaining in possession, and managing the business as his own, is invalid as against the son's creditors who have no notice of such transfer.

2. *Where the father buys the entire interest in a drug-store from his son and the other owners, and permits the son to control the property and carry on the business as his own, for the purpose of avoiding the law prohibiting any person not a registered pharmacist, which the father was not, from running a drug-store, the son's creditors can subject the entire property to their debts,* **and the law will give no assistance to to the father, who put his property in the son's hands for an unlawful purpose.**

Appeal from district court, Wright county, D. R. HINDMAN, Judge.

Action to recover the possession of specific personal property. After the evidence was fully submitted, a verdict for the defendant was returned by direction of the court, and a judgment rendered thereon. The plaintiff appeals.

R. M. Wright, for appellant. Martin & Wambach, for appellee.

ROBINSON, J. In June, 1882, Alexander Latter and Dr. Brackett owned and conducted a drug-store at Goldfield, Iowa. In the month named, Latter sold an undivided one-half of the stock of goods and business to N. M. Melrose and Dr. Morse, and Dr. Brackett sold to them one-third of his share, so that each of the three persons last named owned one-third of the property, and the business was carried on by them as co-partners for a time. Dr. Morse made no payment for his share

and after a few months withdrew from the firm. After his withdrawal, the business was carried on by N. M. Melrose and Dr. Brackett until October, 1883, their interests in the property being equal. On the date last named, Dr. Brackett sold his interest to William Melrose, the father of N. M. Melrose. The latter has paid $400 on account of his purchase. That amount, and whatever sum in addition he put into the business, were loaned him by his father.

When Dr. Brackett withdrew, an arrangement was made which is stated by the son as follows: "I told "father that I did not think I would be able to handle "half of it, and proposed that he should buy out "Brackett, assume my indebtedness, and I would run "the business in my name. He bought out Dr. "Brackett's business, and assumed my debts, and I "took charge of the business in my name. It was be- "cause I held a retail tobacco and liquor license, and "also because my father was debarred by the pharmacy "law from running a drug-store."

On January 1, 1885, the father and son signed an agreement in words as follows: "It is hereby agreed "between Wm. Melrose and N. M. Melrose shall take "charge of the drug business of Wm. Melrose in his "building in Goldfield, Iowa, and do all the business, "buying, selling, etc., and shall receive one-half the "profits for his services; and whenever he (N. M. "Melrose) shall pay to me (Wm. Melrose) one-half of "the amount paid by me for said drug-stock, etc., he "shall become owner of one-half the business."

In January, 1886, a new agreement was made by which the son was to receive $30 per month for his services. He testifies that he then abandoned his plan of buying an interest in the property, but the business was carried on as before. The father was in the store a large part of the time, and gave some directions as to what should be done.

On the 23rd day of March, 1883, Root Bros. obtained a judgment in the district court of Hamilton county against N. M. Melrose for $125.08 damages, and $22.30

costs. On the 28th day of March, 1886, the sheriff of Wright county received an execution issued to satisfy said judgment, and on the same day levied it upon the stock of goods which were used in the business carried on in the name of the son, and claimed by the father, as already stated. Its admitted value is $300. This action was commenced by William Melrose to recover the goods. Before the trial, his death was suggested, and his administrator was substituted as plaintiff. Judgment was rendered in favor of defendant, the sheriff of Wright county, for the amount required to satisfy the execution.

1. The evidence shows that N. M. Melrose owned one-half the stock and business from the time Dr. Morse retired, until October, 1883, when Dr. Brackett sold to plaintiff's intestate. The fact that all the money he had paid on account of the business was furnished by his father did not alter his legal relation to the property. The arrangement by which his father was to assume his debts, and take the property, was not made of record by an instrument in writing duly recorded, as provided by section 1923 of the Code. The son remained in possession and carried on the business, after the arrangement was made the same as before. It does not appear that defendant had any knowledge of the agreement, and we conclude there was not such a transfer of *one-half the property in controversy* as would defeat the levy of defendant, but that it could be enforced to that extent by proper proceedings.

2. A more serious question is presented as to the *remainder of the property.* The judgment which defendant seeks to collect was rendered when the business was owned and carried on by N. M. Melrose and Dr. Brackett and before plaintiff's intestate had acquired any interest in it. It is not shown when the debt upon which it was rendered was contracted, but there is nothing in the record to justify the presumption that credit was given to the debtor on account of any interest he appeared to have in the property in

question. Therefore there is no ground for holding that plaintiff's intestate had so conducted himself with respect to the property as to mislead Root Bros. to their prejudice in the creation of the debt. *It clearly appears, however, that the father authorized his son to remain in possession and control of the property, and to conduct the business in his own name, for an unlawful purpose.* Chapter 75 of the Acts of the 18th General Assembly makes it unlawful for any person not a registered pharmacist to conduct such a business as that carried on by the son. It was held in *State v. Norton*, 67 Iowa, 641, 25 N. W. Rep. 842, that the one who conducts a drug-store is the proprietor within the meaning of the act. The father could not become a registered pharmacist under the provisions of the act, and, to avoid the requirements and penalties provided by law, he arranged for his son to claim and appear to be the actual owner. *Appellant contends that there was not in fact a conveyance of the property by the father to the son, and that the former would not have been estopped to assert his title as against the world excepting claimants for a violation of laws reyulating the practice of pharmacy, and the sale of intoxicating liquors. We do not think the claim can be sustained.* **The father clothed the son with all the visible badges of ownership, and authorized him to declare himself the owner for the purpose of violating the law. Contracts made in violation of law will not be enforced.** *Caldwell v. Bridal*, 48 Iowa, 16; *Reynolds v. Nichols*, 12 Iowa, 403; *Lemon v. Grosskopf*, 22 Wis. 451; 2 Amer. & Eng. Enc. Law, 869–872, and notes. "Contracts intended to promote or requiring the performance of acts forbidden by statute are void." *Dillon v. Allen*, 46 Iowa, 300. A sale and delivery of property on Sunday is illegal and in such a case the law will not enforce the agreement, but will leave the parties where it finds them. *Kinney v. McDermott*, 55 Iowa, 674, 8 N. W. Rep. 656; *Pike v. King*, 16 Iowa, 49.

The property in controversy having been transferred to the son, to be held and treated by him as its ostensible owner, to accomplish a purpose prohibited by law, the father lost the right to reclaim it by law. It could have been used by the son for his own purposes, including the payment of his debts, and it was therefore subject to legal process in favor of his creditors.

As the father claimed to own all the property, what we have said on this branch of the case applies to all. The judgment of the district court is affirmed.

[11 Mass. 368.]

1814.

Inhabitants of Worcester v. Eaton.

The incompetency of a witness to defeat, by his testimony, an instrument to which he is a party, is confined to parties to negotiable instruments.

A conveyance of land made in consideration of a composition of felony cannot be avoided by the grantor.

The grantor in a deed of lands is a competent witness to impeach it, notwithstanding a subsequent deed of the same premises has been made by the grantor to a third party, in consideration of maintenance and support to be provided for the grantor during life.

This was a writ of entry *sur disseisin*, in which the said Inhabitants demand against the said Eaton certain described lands and rooms in a dwelling house, &c., assigned to Betsey Flagg, widow of David F., for her dower, who alleged a seisin of the freehold thereof for her life until disseised by the tenants.

* * * * * *

Parker, C. J.

The defendants claim under a conveyance from Betsy Flagg, who had a life estate in the premises, under an assignment of it by a judge of probate, as her dower in her deceased husband's estate. The consideration of this conveyance was substantially an engagement, on the part of the Inhabitants of the Town of Worcester, to support her during the residue of her life.

The tenant defends under a deed from the same person, executed and delivered almost two years before her deed to demandants, to William C. Fiske and Amos Hudson, for an apparent consideration of 250 dollars, and a deed from the said Fiske and Hudson to him, executed and delivered April 1, 1809.

It is then obvious that the demandants cannot prevail in this suit, unless they can show that the prior conveyance to Fiske and Hudson was void in its execution, or that it is voidable as against the tenant who purchased of them.

It is not stated in the report whether Eaton was a *bona fide* purchnser for a valuable consideration; but that is to be presamed since there is nothing to the contrary in the case.

The demandants attempt to avoid the conveyance to Fiske and Hudson, by showing that the real consideration which passed between the parties was the composition of a felony charged upon the said Betsy Flagg by the two grantees named in the deed, and for proof of this fact at the trial, they produced, besides other evidence, the testimony of the said Betsey, which was received by the judge who tried the cause, and permitted to go to the jury, although objected to by the tenant.

The first question reserved respects the competency of this witness; and it has been objected to her that, being a party to the deed, she should not be permitted, by her testimony, to defeat what, by her free and voluntary act, she had attempted to establish; and also that she was in some measure interested, that is, to secure to the defendants the fund upon the faith of which they had undertaken to maintain her.

But we are of opinion that she is a competent witness, notwithstanding these objections. The rule lately settled in this Court, respecting the competency of witnesses, who are parties to the instruments to be defeated by their testimony, applies exclusively to parties to a negotiable instrument, as was stated in the case of *Churchill v. Suter* (4 Mass. 156).

The other objection cannot prevail, for their is no legal and direct interest in the event of this suit; and the circumstance relied upon to prove her interest proves nothing more than a possible bias, which the jury are to judge of in considering her credibility.

Taking her testimony, then, as correctly given, and as corroborated by other evidence, we must believe that the only consideration of the conveyance to Fiske and Hudson, except a trifling sum which was given for form's sake after the deed was executed, was the expectation on her part of some indulgence, by the means of those grantees, on a complaint or suspicion, that existed against her of having received stolen goods, or some other criminal act conneted with a larceny committed on the said Fiske and Hudson's property by one Gleason, who was aftewards convicted thereof. And, indeed, from the manner in which the cause was put to the jury by the judge, we are obliged to consider the jury as having found, by their verdict, that the deed was given altogether in consideration of an expected release from a criminal prosecution by the intervention of the said Fiske and Hudson, and for no other cause.

And, indeed, from the manner in which the cause was put to the jury by the judge, we are obliged to consider the jury as having found, by their verdict that the deed was given altogether in consideration of an expected release from a criminal prosecution by the intervention of the said Fiske and Hudson, and for no other cause.

The question is, then, whether a deed given under such circumstances is absolutely void, or whether it can be avoided by the entry of the grantor, so that a subsequent conveyance, made by her *bona fide*, and for a valuable consideration, will pass the estate. And we are of opinion that the deed so given is not void; nor was it voidable, even against Fiske and Hudson, by the entry of the grantor, for the reasons mentioned.

A bond or other obligation or a written promise founded upon such a consideration, may be avoided; because the law will not uphold a contract, or permit a party to enforce it, if it was made to secure the price of an unlawful act. Thus, in the case of *Collins v. Blantern* (2 Wils. 347), a bond given for the com-

pounding of a felony was avoided by plea setting forth the illegality for which it was given. But it was holden in that case, and it has been holden in numerous other cases, that where money has in fact been paid upon such consideration it cannot be recovered back again, because *in pari delicto potior est conditio defendentis.*

There have been some cases in England which look as if in all instances where a party has paid money upon an illegal transaction, he may recover it back again in an action for money had and received. But it is now unquestionably settled there that an action for money so paid cannot be maintained where the parties are really *in pari delicto*, and upon looking into all the cases on the subject, some of which have already been referred to, it will appear that a distinction is maintained between those cases in which one of the parties has by an illegal act taken advantage of and oppressed the other, and those in which it is not possible to distinguish between the parties, as to the degree of their criminality. Thus when usury has been paid, it is considered that the lender has availed himself of the distress of the borrower, and has violated the laws to extort from him more than the lawful rate of interest. In this case an action for money had and received will lie for the excess.

In the cases of *Smith v. Bromley* (Doug. 696*n*) and *Browning v. Morris* (Cowp. 790), the doctrine, as laid down by Lord MANSFIELD, is that where certain acts are made unlawful by the statute, to protect unwary and ignorant people from oppression and extortion, there although both parties are guilty of violating the law, yet they are not equally guilty, and that in such cases the party from whom money is exacted shall recover it back from him who practices the oppression. Such are the cases of usury of money paid to a creditor by a bankrupt to produce a signature to a certificate, and moneys paid contrary to the laws regulating lotteries.

But that in all acts which are unlawful on account of their immorality, or because they are hostile to public policy, there the parties to the act are in pari delicto and potior est conditio defendentis.

This distinction seems to have been ever afterwards observed in the English courts; and being founded in sound principle, is worthy of adoption as a principle of the common law in this country.

And in the case of *Vandyck & Al. v. Hewitt* (1 East, 98), Lord KENYON again recognizes and adopts Lord MANSFIELD'S distinction, and says that the rule has been settled in all times, that *in pari delicto potior est conditio defendentis.*

It appears there to be the settled law in England, and we are satisfied that it is also the law here, that where two parties agree in violating the laws of the land, the court will not entertain the claim of either party against the other for the fruits of such an unlawful bargain. If one holds the obligation or promise of the other to pay him money, or do any other valuable act, on account of such illegal transaction, the party defendant may expose the nature of the transaction to the court; and the law will say: "Our forms and rules are established to protect the innocent and to vindicate the injured, "not to aid offenders in the execution of their "unjust projects;" and if the party who has foolishly paid his money repents his folly, and brings his action to recover it back, the same law will say to him, "You have paid the price "of your wickedness, and you must not have "the aid of the law to rid you of an inconvenience which is a suitable punishment of "your offense."

If, then, the composition of a felony or of a larceny is an illegal consideration of any promise or obligation for money, the party claiming under such instrument cannot enforce it in a

a court of justice; nor can the other party, if he has paid it, recover it back again.

There must, then, be a distinction between a conveyance of land and money paid on such consideration, or Betsey Flagg could not, on this ground, avoid her deed to Fiske and Hudson by entry or action, so as to convey any title to the demandants. Such a distinction was attempted in the argument, but we find no foundation for it.

A deed of bargain and sale, signed, sealed, delivered, acknowledged, and recorded, is an actual transfer of the land to the grantee as much as the delivery over of a sum of money, or of a personal chattel, is a transfer of either of those. And in addition to the deed in the case at bar, it is in evidence that the original grantee had by deed also conveyed the same land to the tenant, who entered and occupied more than a year before Betsey Flagg entered and made her deed to the demandants.

We are satisfied that her entry was tortious, and that she acquired no right by it to convey, if there is no other defect than the composition which has been spoken of; and if such entry would have been good against Fiske and Hudson, it would not avail her against Eaton, provided he were a *bona fide* purchaser for a valuable consideration, without any knowledge of the illegal transaction between the original parties. But the case suggests another point, which, from the apprehension of the judge who sat in the trial that it was not necessary to be settled, was not fully before the jury; which is, that the deed of Betsey Flagg, under which the tenants claims, was obtained from her by duress of imprisonment, or threats of imprisonment. As we are inclined to think that menaces of imprisonment to a woman, fully made out in evidence, would avoid any deed or other instrument extorted from her by such means, we think there ought to be a more full trial on that point. We do not, however, see any facts stated in the report which would establish this defence

satisfactorily to our minds; but it being a proper subject for the jury to decide upon, and a new trial being necessary, to conform to our opinion upon the other point, we think it proper to suggest that this point of the subject ought to be more fully tried.

With respect to the other questions,—the capacity of the town to take, and the nature of the consideration in the conveyance to the town,—there is no necessity now to decide them; since the question now decided makes a new trial necessary, and these questions may hereafter come before us more directly.

Let a new trial be granted.

[12 Met. 397.]

1847.

Ball v. Gilbert, Trustee.

A wager on the event of an election is illegal and void.

When the parties to a wager on the event of an election place money in the hands of a third person, as stakeholder, he is immediately liable, in the trustee process, to a creditor of either of them.

When one who is charged, in the court of common pleas, as trustee of another, under Rev. Sts. c. 109, appeals to the supreme judicial court, and is charged there also, he is not entitled to any costs on his appeal.

This was an action of assumpsit, in which the declaration alleged that "the said Gilbert, at Boston, on the "seventh day of November, 1844, for value received of "the plaintiff, drew his order, in writing, under his "hand, of that date, directed to James Cheever to pay "to the plaintiff the sum of one hundred dollars; and "the plaintiff, on said seventh day of November, at "said Boston, presented said order to the said Cheever "for his acceptance and payment, which the said "Cheever then and there refused to do; of which the "said Gilbert then and there had due notice, and was "requested to pay the same; whereby he became "liable." There were also the money counts.

The said Cheever, on whom said order was drawn, was summoned as the trustee of the defendant, and the writ was served upon him on the 27th of November, 1844.

At the January term of the court of common pleas, in 1845, the principal defendant was defaulted. At a subsequent term, the trustee filed his answer, which was as follows:

"In September or October, 1844, Henry Davis and "the defendant Gilbert came to my counting room, "and placed in my hands the sum of one hundred and "seventy-five dollars, Gilbert one hundred dollars, and

" Davis seventy-five dollars, which I was requested to " hold and dispose of upon the following terms, as con- " tingencies; that is to say, if Henry Clay was elected " the next president of the United States, I " was to pay the sum of one hundred and " seventy-five dollars to said Gilbert; and if " Henry Clay was not so elected, I was to pay said sum " to said Davis. I was about to make a memorandum " in writing, to which Mr. Gilbert objected, and said " there was no need of any; that Mr. Davis was a gen- " tleman, and would not sue back; and for himself, he " would sooner have his hand cut off than to sue for " it or do anything dishonorable about it. I accord- " ingly made no memorandum, and took the money. " On the 15th of January, 1845, when the result of the " election was ascertained to my satisfaction, I paid " said sum of one hundred and seventy-five dollars to " said Davis, and had not then, nor have at any time " ever received any notice or direction from said Gil- " bert, not to pay over said money, or any part of it, " to said Davis, either personally or in writing from " him, or by any one acting or assuming to act as " agent of said Gilbert. In the latter part of Novem- " ber, 1844, a person whom I suppose, but do not " know, to be Ball, the plaintiff, presented to me a " draft, in the common form, purporting to be signed " by Henry Gilbert, to pay to said Ball (I think) one " hundred dollars, for value received. I do not know " whether the signature was the handwriting of said " Gilbert, or not; and he has never said any thing to " me on the subject, before or since. Said draft had " no reference to any bet made by said Gilbert, nor to " the presidential election; not did it contain any " notice or direction not to pay any money, in my " hands, to said Davis, nor to refund to said Gilbert, " or to pay to said Ball, or any other person, any " money said Gilbert had deposited in my hands. The " person who presented said paper did not direct me " not to pay said money to any person but himself,

"nor give any directions as to said money; nor did he "assume to act, or appear to act, for said Gilbert, but "for himself alone. I have no recollection of any "transaction with said Gilbert, except that described "above, when the said Gilbert placed money in my "hands, to be paid over as then directed, which direc- "tion was never countermanded by said Gilbert, in "any way, to my knowledge."

The court of common pleas charged said Cheever, on his aforesaid answer, and he took an appeal to this court.

W. HILLIARD, for the plaintiff.

HALLETT, for the trustee.

SHAW, C. J. We do not think it necessary, in this case, to enter on the general discussion whether, in this Commonwealth, a wager on an indifferent subject, in which the parties have no other interest than that created by the wager itself, is a legal contract, or one which may be enforced in a court of justice. In England, it has been reluctantly held, until recently, and still is, unless changed by statute, that for an equal wager, upon an indifferent subject, depending upon a contingency, though of a trivial nature, an action may be maintained; *Good v. Elliott*, 3 T. R. 693; though in that case a very able dissenting opinion upon the general ground was given by Mr Justice BULLER.

But even in England, the general rule is held subject to so many restrictions and exceptions, that it remains applicable to very few cases. If the wager be upon a game or other transaction prohibited by law; if it draws into question the rights, feelings, interests or quiet of other persons; if it promote any violation of law, or operate as an incitement to a breach of the peace; if it be contrary to good morals or sound public policy, the wager is void. In Massachusetts, it is believed no action has been sustained upon a wager; perhaps because none has been brought. We are not aware that there has been any direct adjudication on the subject. As far as judicial opinions have been indirectly expressed, they have been adverse to such an

action. *Amory v. Gilman*, 2 Mass. 1. *Babcock v. Thompson*, 3 Pick. 446. And Chancellor KENT, in his Commentaries, considers the law so settled in Massachusetts. 3 Kent Com. (3 ed.) 278.

But it is perhaps useless to speculate upon the general question of the legality of wagers, on different subjects of contingency. The more precise question here is, whether a wager upon the event of an election to a public office, depending upon popular suffrage in this Commonwealth, is valid, and constitutes a legal contract. The answer is too obvious to admit of doubt. And it seems to us, that upon principle, such a wager is equally void, whether it be upon the election of an officer of the United States, of the state government, of a county, town, parish, or other aggregate corporation, depending upon suffrage. The very theory of such popular institutions is, that the person elected to office is placed there by the free choice of the majority of persons free to inquire and judge, free to will and determine, and free to act with purity and intelligence, uninfluenced and unseduced by interested, sinister, or corrupt motives. If the persons voting act otherwise, they act without regard to the fitness of the candidate, or to their own sense of duty. Upon the practical maintenance of this theory, in its purity and perfection, or as near an approximation to it as the infirmities and vices of society will permit, depend the utility, the safety and the stability of all popular institutions, relying upon popular suffrage for their basis and operation. And it is obvious that the more extensive and general the right of suffrage is, the more easily it may be abused and perverted, and the more important it is that its purity should be guarded and preserved. The more general the right of suffrage, the smaller the proportion of power which the vote of each one carries, the more easily is it influenced, and, if voters should ever become venal, the smaller the price at which each can be influenced or controlled.

If one bet can be made on an election, many can be made. If small sums can be staked, large ones can.

So that, on a great and exciting popular election, a large amount of money may depend on the result. All those who are acting together will have a common, and may have a large pecuniary interest in the issue. And it is conformable to the most obvious principles of economy, and dictated by the common motive to human action, self-interest, that those who are to gain or lose a large sum of money, upon the happening of an event which is contingent, should make a reasonable outlay of money, to influence and bring about that event. This, therefore, they will be likely to do, without regard to the social and political merits of the election. It may happen—in fact it does often happen—that a few thousand, or even a few hundred, votes may decide the election of a state; and the election of a state may decide that of the Union. If a few thousand dollars will command or influence such a number of votes, would it not be presuming too much on pure, disinterested virtue, to believe that they would not be applied? And such influence is to be brought to bear, not merely on the few hundreds or thousands, who may turn the scale, but upon the whole body of voters, on both sides.

But money may be applied to effect the result, not only in the coarse, palpable and offensive form of bribery, by the direct purchase of votes, but in other modes quite as efficacious, and not less detrimental to the public interest. It may be applied, by the managers of the respective parties, to the provision of treats and other gratifications; to the opening of houses of entertainment, to which partisans may resort at free cost, where the passions may be stimulated, the moral sense perverted, and all idea of social duty and personal responsibility overwhelmed in mere blind partisan feeling and desire of triumph, which lose sight of the object for which the right of suffrage is conferred. An election so influenced could not be regarded as the expressed will of an intelligent constituency; it would violate the whole theory, on which the right of suffrage is founded, and destroy the con-

fidence of all judicious persons in that particular power of the people, which has been regarded as the principle security for permanent, regulated, constitutional liberty. If it be true that wagers on elections would have any tendency to create such a pecuniary interest in their result, as we have no doubt they have, we can have no hesitation in saying, that all such wagers are illegal and utterly void.

But the position here taken is well supported by authority. It was held, in England, that a wager on the event of an election of a member of parliament was void; but that was a bet between voters, *Allen v. Hearn*, 1 T. R. 56. So in Pennsylvania. *M'Allister v. Hoffman*, 16 S. & R. 147. *Smith v. M'Masters*, 2 Browne, 182. So in New York. The first case was that on an election in which the parties were voters; one party had voted, but by possibility the other party might have voted after the bet was made, and some stress was laid on this circumstance. *Bunn v. Lansing*, 8 Johns. 454. Afterwards the same decision was given upon a bet made after the voting had closed, and it could not influence the particular result. *Lansing v. Lansing*, 8 Johns. 454. And the same decision, on general grounds, was made in several cases. *Vischer v. Yates*, 11 Johns. 23. *Yates v. Foot*, and *Denniston v. Cook*, 12 Johns. 1, 376. *Rust v. Gott*, 9 Cow. 169. The same doctrine has been held in Rhode Island and other states. In Rhode Island, an able opinion was given by Chief Justice EDDY, in the case of *Stoddard v. Martin*, 1 R. I. Rep. 1, and also stated in a very good note in 9 Cow. 175.

Supposing, then, the contract to be illegal and absolutely void, what are the rights and obligations of the respective parties under it. The law will not lend its aid to carry into effect an illegal contract, if it be executory, nor to restore the party who has paid money on it, if executed. They are *in pari delicto*. The winner cannot maintain an action against the loser to recover it if not paid, nor the loser to recover it back when paid.

A question might arise, whether the stakeholder might not stand on the same footing, and be held to be amenable to neither party for money received on such a wager; but we think it clear that in no proper sense can a stakeholder be regarded as a party to the illegal contract, or *in pari delicto*. He is a mere depositary of both parties for the money deposited by them respectively, with a naked authority to deliver it over on the proposed contingency. If the authority is actually revoked before the money is paid over, it remains a naked deposit, to the use of the depositor. *Cotton v. Thursland*, 5 T. R. 405. *Lacaussade v. White*, 7 T. R. 535. It was said by LEBLANC, J., in *Vandyke v. Hewitt*, 1 East., 98, that the authority of *Lacaussade v. White* had been much canvassed in *Howson v. Hancock*, 8 T. R. 575. See also the remarks of MANSFIELD C. J., in 3 Taunt. 284, and of LAWRENCE J., in 8 East, 382, note. But the distinction between those cases is quite obvious. The former was upon an illegal wager, against the stakeholder, after the event had happened, but before the money had been paid by the stakeholder to the winner. It remained in the hands of the stakeholder as a naked deposit, with authority to pay it over upon the contingency; the bringing of the action was a revocation of the authority, so that it became a deposit to the plaintiff's use. In *Howson v. Hancock*, the money had been paid over to the winner; and then it stood upon the same footing as if paid by the loser himself, who, being *in pari delicto*, could not maintain an action to recover it back. The same principle was settled in a case already cited for another purpose. *Vischer v. Yates*, 11 Johns. 23.

We think the money deposited by each party was a simple, naked deposit, respecting which the agreement to pay it over to one, according to the result of the pending presidential election, and not executed by actual payment, was wholly inoperative and void; and then, by implication of law, the money was so deposited to the use of the depositors respectively; and that an action for money had and received would lie for

each party for the amount so deposited by him. So that, at the time of the service of this writ, November 27th, 1844, Cheever held $100 as a deposit to the use of Gilbert, and if he was liable to be charged as trustee at that time, it is no good answer, that afterwards, in February, and when the result of the election was ascertained, he paid over the amount to Davis, the winner. It was a payment in his own wrong.

If it be urged that the contract was voidable, and could only be avoided by the party himself who had made the deposit; that it was a personal privilege to rescind it, which he might exercise or not, by notice to the depositary not to pay over; and that no such notice, or notice of the revocation of his authority, was given personally by the principal defendant to the trustee; we think the argument cannot avail. The contract, as between the parties to the wager, was not voidable only, but absolutely void; not as injurious to the rights of one party, which he may avoid at his election, but as contrary to public policy, and wholly void, and needed not the act nor will of the party to rescind it.

The contract being void between the parties, the money in the hands of the stakeholder becomes a naked deposit to the use of the depositor, and is precisely within the provision of the trustee law. He has effects of the principal defendant intrusted and deposited in his hands, liable to be attached. Rev. Sts. c. 109 § 4.

As an owner of money or other property may give it away without consideration, if he can do it without injury to his creditor or other third person, so he may authorize one holding money for his use to do the same. **If, therefore, such stakeholder has paid over the money, with the authority of the depositor, before notice of the revocation of such authority, and before the right of any third person has intervened, the depositor, as we have seen, cannot recover it back.** In the present case, the money had not been paid over when the attachment

was made; no formal act of revocation on the part of the depositor was necessary; the attachment was an official revocation by rendering the depositor liable by law to answer to the attaching creditor. The service of the process, therefore, being thus a revocation of the authority of the stakeholder to pay over to Davis the money deposited by Gilbert, the depositary, Cheever, became chargeable as the trustee of Gilbert, to the amount of that deposit; and any payment afterwards was a payment in his own wrong.

Trustee charged.

[101 Mass. 363]

1869.

Atwood v. Fisk.

A bill in equity will not lie to compel the surrender or cancellation of an overdue promissory note and a mortgage given to secure its payment, on the ground that the consideration for the note and mortgage was a promise of the payee to forbear to prosecute for an embezzlement.

AMES, J. It has also long been settled that the law will not aid either party to an illegal contract to enforce it against the other, neither will it relieve a party to such a contract who has actually fulfilled it and who seeks to reclaim his money or whatever article of property he may have applied to such a purpose. The meaning of the familiar maxim, *in pari delicto potior est conditio defendentis*, is simply that the law leaves the parties exactly where they stand : not that it prefers the defendant to the plaintiff, but that it will not recognize a right of action founded on the illegal contract in favor of either party against the other. They must settle their own questions in such cases without the aid of the courts. In the somewhat quaint language of Lord Chief Justice WILMOT in *Collins v. Blantern* (2 Wils. 350) "all writers upon our law agree on this : No polluted hand shall touch the pure fountain of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again ; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul, o procul este, profani !*

In this respect the rule in equity is the same as at law. Equity follows the rule of the law and will not interfere for the benefit of one such party against a *particeps criminis*. The suppression of illegal con-

tracts is far more likely in general to be accomplished by leaving the parties without remedy against each other. And so the modern doctrine is established that relief is not granted where both parties are truly *in pari delicto.* 1 Story Eq. 298; *Claridge v. Hoar,* 14 Ves. 59.

There is no reason why equity should be able to grant relief upon principles different from those recognized in courts of law. If the plaintiffs were occupying the position of defendants, and if the cases before us were actions brought to recover the amount of the notes in question they could avail themselves of the maxim above referred to by way of defense. But they do not stand in that position. They are themselves invoking the aid of the court, in its equity jurisdiction, to relieve them from a contract which they allege to be illegal. They are actors or plaintiffs and are apparently in a position in which the maxim in question can be invoked and relied upon on the other side. If the notes were founded on an illegal consideration why should the court lend its process to one party to the illegality rather than the other? What superior equities in that view of the case have these plaintiffs over the defendants. We see no such inequality in position, or abuse of advantages, as to entitle them to the aid of the court on the ground of public policy. If there has been a composition of a felony or a suppression of a criminal prosecution, the plaintiffs were parties to it as well as the defendants, and it may perhaps be argued that the plaintiffs have had the benefit of the alleged corrupt agreement and are merely seeking to be relieved from its inconveniences. They are seeking not to get back money paid under an illegal contract, but to recall notes and securities which they have given under such a contract, a distinction which is too slight to make much difference in the substantial equities of the case (*Worcester v. Eaton,* 11 Mass. 375). We see no occasion for the interference of the court as prayed for upon any view of the case.

[101 Mass. 366; 3 Am. Rep. 368.]

1869.

Myers vs. Meinrath.

An action will not lie for the conversion of a chattel, sold and delivered by the plaintiff to the defendant in exchange for another chattel, on the Lord's day, and retained by the defendant afterwards, notwithstanding the return by the plaintiff of the chattel for which it was exchanged and his demand for a corresponding return by the defendant.

WELLS, J.:

That contracts made upon the Lord's day are illegal; that no action based upon such a contract can be maintained in a court of law or equity, either to enforce its obligations or to secure its fruits, in favor of either party; are propositions settled beyond controversy.

But such contracts are not altogether inoperative. They may be executed by the parties, and then the same principal of public policy which leads courts to refuse to act, when called upon to enforce them, will prevent the court from acting to relieve either party from the consequences of the illegal transaction. This may indirectly give effect to the executed illegal contract. The purpose of the rule of law, however, is not to give validity to the transaction, but to deprive the parties of all right to have either enforcement of or relief from their illegal contracts. In such cases, the defence of illegality prevails, not as a protection to the defendant, but as a disability in the plaintiff.

Upon this principle, possession, acquired from an illegal transaction, or by a contract fully executed, will often avail the party holding it, as a sufficient title. Neither party is allowed to impeach its validity by asserting

the illegality of his own act. The transaction takes effect from the disability of the parties to assert any right to the contrary. The Court does not give it effect, but simply refuses its aid to undo what the parties have already done. Chit. Con. (10th Am. ed.) 732. *Johnson v. Willis*, 7 Gray, 164. *King v. Green*, 6 Allen, 139. *Worcester v. Eaton*, 11 Mass. 368.

The plaintiff relies upon certain intimations in the opinion by which the decision of the Court was announced in the case of *Ladd v. Rogers*, 11 Allen, 209. The contract was there held to be illegal, so that no action could be maintained for the price of a horse sold and delivered upon the Lord's day. It was also held that no implied *assumpsit* for the value of the horse arose from the fact that the defendant afterwards retained and treated the horse as his own. This last point was decided upon the general principles applicable to *assumpsit* and not on any ground of taint from the original illegality. The opinion also strongly intimates that the sale was wholly nugatory, passed no property and gave no rights; and that the plaintiff might have maintained trover for the conversion of the horse, notwithstanding the sale and delivery.

The case of *Williams v. Paul*, 6 Bing. 653, arose upon a similar state of facts, with the addition of a subsequent promise to pay. The Court held that the value of the property—not the price agreed for on Sunday—might be recovered upon *quantum meruit*.

There are other authorities to the effect that, where there has been only a partial execution of an illegal contract, the party who has advanced money or delivered property under it may reclaim and recover it. This is sometimes put upon the ground that it is better to encourage the revocation than the fulfillment of such contracts; sometimes upon the ground of a difference in the position of the parties in respect to the illegality of the transactions, or of some advantage taken or fraud committed by one upon the other. Upon this latter ground the case of *Adams v. Gay*, 19 Verm. 358, appears to have been placed. In that

case there had been an exchange of horses on Sunday. The whole transaction was completed on that day. One of the parties, being cheated in the trade, undertook to revoke and was allowed to recover, not on the ground that the whole transaction was void and inoperative, but on the ground of fraud in the other party, and as an exception to the general rule. The judgment did not rest upon that ground; but the doctrine, substantially as above stated, was announced by the court as the reason for refusing to allow the defendant, after argument upon exceptions, an opportunity to set up the defence of illegality under the statute of another state. Upon the point stated in *Adams v. Gay*, that an action lies for fraud in a contract void for illegality, the decisions in Massachusetts are clearly to the contrary. *Robeson v. French*, 12 Met. 24. *Way v. Foster*, 1 Allen, 408. *Gregg v. Wyman*, 4 Cush. 322.

It is a question undoubtedly to be determined by the Court upon considerations of public policy. But those considerations must be general, and not such merely as arise out of the facts of the particular case. Where the payment or delivery is made for the furtherance of an immoral or illegal purpose, the Court will not help the guilty party to revoke, although another, equally guilty, may thereby make an undeserved gain. But where the illegality consists in the time or mode in which the transaction takes place, and not in the character of the transaction itself, the court will undoubtedly regard the position of the parties in respect to the subject matter. Thus in the case of a horse delivered in pursuance of an illegal contract of hire on the Lord's day, although the owner cannot recover upon his contract, and can have no remedy for excessive use or injury to his horse while in the possession of the hirer, yet he is not deprived of his title to the horse, and he may at any time retake possession and thus be restored to all his rights. The fact of an illegal bailment or delivery, without any purpose to pass the title, will not enable the party receiving

the property to convert it to his own use, or withhold it from the owner, without any legal liability therefor. *Dwight v. Brewster*, 1 Pick. 50, 55.

In case of a contract of sale not executed by payment of the consideration, when the contract remains executory on one side, the law which declares the executory part of the contract void might well regard the partial execution ineffectual. It is not necessary, however, to decide the point, inasmuch as in the present case the contract was completely executed on both sides, the parties are *in pari delicto*, and, by refusing to aid either party in the attempt to restore himself to his former position, we leave him in the condition in which he has placed himself by his own illegal conduct. That, as we understand it, is the aim of the courts in applying the general rule upon this subject.

The plaintiff contends that the rule does not apply, because he does not seek to enforce any rights which depend at all upon the illegal transaction; that both the legal title which he asserts, and the proof by which he maintains that title, not only omit to disclose, but utterly disregard the unlawful sale; whereas it is the defendant who is obliged to set up the illegal conduct of himself and the plaintiff alike, in order to justify his retention of the plaintiff's property. But the illegality lies directly in the course of events which placed the property in the hands of the defendant, and made it necessary for the plaintiff to resort to this suit to regain it. It is inseparably connected with the origin of the cause of action, and it is immaterial which party discloses it to the court. *Gregg v. Wyman*, 4 Cush. 322. *Duffy v. Gorman*, 10 Cush. 45. The ends of justice are found to be best secured by permitting it to be thus administered upon one of two offending parties at the instigation of the other.

The decision of the superior court is accordingly affirmed.

Judgment for defendants.

[105 Mass 399.]

1870.

Horton v. Buffington.

The owner of a wagon sold it on a Lord's day to one who resold it to a third person, who was ignorant that his vendor had bought it on a Lord's day. *Held*, that it was not liable to attachment in the hands of this buyer on a writ against the original owner.

AMES, J. It is well settled that contracts made upon the Lord's day are illegal and cannot be enforced. It is equally well settled, however, that after such a contract has been executed and carried into full effect, the law will not aid a party, who has paid money or delivered property in pursuance of its terms, to reclaim what he has so parted with. The policy of the law is to leave the parties in all such cases without remedy against each other. The defence of illegality is allowed, "not as a protection to the defendant, but as a disability in the plaintiff." *Myers v. Meinrath*, 101 Mass. 366.

The case finds that the wagon in dispute, although it may be true that it was sold by Jarvis B. Horton on the Lord's day, was delivered to his brother, Charles A. Horton, was subsequently sold by the latter to the plaintiff, and was in the actual possession and use of the plaintiff at the time of the attachment by the defendant. In the absence of all evidence to the contrary, it may be assumed that the consideration of the first sale was paid.

Under such circumstances, it is difficult to see how the original vendor, Jarvis B. Horton, could have reclaimed it on the ground of any illegality in the contract of sale. The law would not aid him to undo what he had done. He could only impeach the sale by showing the illegality of his own act, which in the case of an executed and completed contract he cer-

tainly can not do. This disability on his part to reclaim it would avail the party holding it, as a sufficient title. *Myers v. Meinrath, ubi supra.*

It had ceased to be the original vendor's property, or liable for his debts, and therefore the attachment under which the defendant seeks to justify was wrongful. *King v. Green*, 6 Allen, 139. *Claridge v. Hoare*, 14 Ves. 59. *Way v. Foster*, 1 Allen, 408. *Gregg v. Wyman*, 4 Cush. 322. *Samson v. Shaw*, 101 Mass. 145.

Exceptions overruled.

[107 Mass. 439 : 9 Am. Rep. 45].

1871.

Joshua Cranson vs. David W. Goss.

One who takes a promissory note, bearing date of a secular day, before maturity, in good faith and for a valuable consideration, may maintain an action thereon, against the maker, although the note was in fact so made on the Lord's day that no action could be maintained on it by the original payee.

Action on a promissory note dated December 15, 1869, payable in one year to the order of John Wells, and by him indorsed to the plaintiff. The case was submitted for the opinion of the court on the following statement of facts:

"It is agreed that the plaintiff is a *bona fide* holder "of the note in suit, for a valuable consideration, and "that he obtained it before it was due without notice "of any defect, illegality or other infirmity in it. It "is also agreed that the contract upon which the note "itself was based, was made upon Sunday; and that "the note was made, signed and fully delivered upon "Sunday to the original payee. The note bears date "of the succeeding Wednesday."

GRAY, J.

The ground upon which courts have refused to maintain actions on contracts made in contravention of statutes for the observance of the Lord's day, is the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction.

The general principle was long ago stated by Lord MANSFIELD with his usual completeness and felicity of expression: "The objection that a contract is immoral "or illegal, as between plaintiff and defendant, sounds "at all times very ill in the mouth of the defendant. It

"is not for his sake, however, that the objection is "ever allowed; but it is founded on general principles "of policy, which the defendant has the advantage of, "contrary to the real justice, as between him and the "plaintiff; by accident, if I may so say. The prin- "ciple of public policy is this: *Ex dolo malo non oritur* "*actio.* No court will lend its aid to a man who "founds his cause of action upon an immoral or an "illegal act. If from the plaintiff's own statement or "otherwise, the cause of action appears to arise *ex* "*turpi causa*, or in transgression of a positive law "of this country, then the court says he has no "right to be assisted. It is upon that ground the "court goes; not for the sake of the defendant, but "because they will not lend their aid to such "a plaintiff. So if the plaintiff and defendant "were to change sides, and the defendant were to "bring his action against the plaintiff, the latter would "then have the advantage of it; for when both are "equally in fault, *potior est conditio defendentis.*" *Holman v. Johnson*, Cowp., 341, 343.

It is upon this principle, that a bond, promissory note or other executory contract, made and delivered upon the Lord's day, is incapable of being enforced, or, as is sometimes said, absolutely void, as between the parties. *Patte v. Greely*, 13 Met. 284. *Merriam v. Stearns*, 10 Cush. 257. *Day v. McAllister*, 15 Gray 433. *Towle v. Larrabee*, 26 Maine, 464. *Pope v. Linn*, 50 Maine, 83. *Allen v. Deming*, 14 N. H. 133. *Finn v. Donahue*, 35 Conn. 216. And it follows that as between them it is incapable of being confirmed or ratified; for, in suing upon the original contract after its ratification by the defendant, it would still be necessary for the plaintiff, in proving his case, to show his own illegal act in making the contract at first. *Day v. McAllister* and *Pope v. Linn*, above cited. *Ladd v. Rogers*, 11 Allen, 209. *Bradley v. Rea*, 14 Allen, 20.

Upon the same principle, if the contract has been executed by the illegal act of both parties on the Lord's day, the law will not assist either to avoid the

effect of his own unlawful act. Thus if the amount of a pre-existing debt has been paid and received on Sunday, the law will neither assist the debtor to recover back the money, nor the creditor, while retaining the amount so paid, to treat the payment as a nullity, and enforce payment over again. *White v. Buss*, 3 Cush., 448, 450. *Mills v. Western Bank*, 10 Cush., 22. *Johnson v. Willis*, 7 Gray, 164.

If a chattel has been delivered by the owner to another person on the Lord's day by way of bailment or pledge, the latter may retain it for the special purpose for which he received it; or, if it has been delivered to him on the Lord's day by way of sale or exchange, it cannot, at least if he has at the same time paid or delivered the consideration on his part, be recovered back at all. *Scarfe v. Morgan*, 4 M. & W. 270. *King v. Green*, 6 Allen, 138. *Myers v. Meinrath*, 101 Mass., 366. *Horton v. Buffington*, 105 Mass., 399. *Smith v. Bean*, 15 N. H. 577, *Greene v. Godfrey*, 44 Maine, 25.

If a chattel has been sold and delivered on the Lord's day without payment of the price, the seller cannot recover either the price or the value; not the price agreed on that day, because the agreement is illegal; not the value, because, whether the property is deemed to have passed to the defendant, or to be held by him without right, there is no ground upon which a promise to pay for it can be implied. *Simpson v. Nicholls*, 3 M. & W., 240; S. C. 5 M. & W. (Eng. Ed.) 702 note; 3 M. & W. (Am. Ed.) 244 note. *Ladd v. Rogers*, 11 Allen, 209.

But if the whole evidence shows a complete cause of action, independently of any participation of the plaintiff in an illegal transaction, he may recover. Thus an agreement made on the Lord's day for the use and occupation of land is void; but a subsequent entry upon and occupation of the land will sustain an action upon an implied promise to pay what its use is reasonably worth. *Stebbins v. Peck*, 8 Gray, 553; explained

in *Day v. McAllister*, 15 Gray, 433. So if a written or oral request for the performance of services, and promise to pay a certain compensation therefor, is made and received on the Lord's day, but there is no proof of assent to the request on that day, and the services are performed on a subsequent day, before the request has been withdrawn, the promised compensation may be recovered. *Tuckerman v. Hinkley*, 9 Allen, 452. *Dickinson v. Richmond*, 97 Mass., 45. *Sitackpole v. Symonds*, 3 Foster, 229.

The law simply refuses to allow either party to invoke any aid from the court to give effect to an illegal transaction in which he has taken part. An additional illustration of this is afforded by a recent case in this court, in which it was held that if a bargain is made on the Lord's day for a sale of chattels (which is of itself void and incapable of ratification) and the chattels are delivered and accepted on the following day, with the purpose that they be sold and paid for, the seller may recover upon the implied contract of the buyer to pay what they are reasonably worth, and neither party can be permitted to prove the terms, either as to price or warranty, agreed between them on the Lord's day. *Bradley v. Rea*, 14 Allen, 20, and 103 Mass., 188.

The same rule has been applied under statutes which merely prohibited any one from doing on the Lord's day "any labor or business of work of his ordinary calling." Where such a statute prevails, one party cannot sue upon a contract made by him on the Lord's day in the exercise of his ordinary calling, even if it is not within the ordinary calling of the other and the parties met on that day at the request of the latter. *Hazard v. Day*, 14 Allen, 487. But upon a contract made on the Lord's day in the exercise of the ordinary calling of one party, the other may sue, if it was not within his own ordinary calling, and he did not know, when he entered into it, that it was within the ordinary calling of the defendant. *Bloxsome v. Williams*, 3 B. & C., 232; S. C. 5 D. & R., 82; 1 C. & P. 294.

See also *Emory v. Kempton*, 2 Gray, 257; *Roys v. Johnson*, 7 Gray, 162.

A promissory note given and received on Sunday, and therefore void as between the original parties, might be equally void in the hands of a subsequent holder who took it with notice of the original illegality. See *Allen v. Deming*, 14 N. H. 133; *Holden v. Cosgrove*, 12 Gray, 216; *Davidson v. Lanier*, 4 Wallace, 447. Even if the note bore date of a Sunday, however, that mere fact would not be conclusive evidence that he took it with such notice; for, though dated on Sunday, it might have been delivered on another day and so valid even as between the original parties. *Hill v. Dunham*, 7 Gray, 543. *Hilton v. Houghton*, 35 Maine, 143.

In the present case, it is agreed that the contract which was the consideration of the note in suit was made on Sunday, and that the note was made, signed and fully delivered on Sunday to the original payee. Clearly therefore he could not have maintained an action upon it.

But it is also agreed that the note bears date of a secular day; and that the plaintiff is a *bona fide* holder of the note, for a valuable consideration, and took it before it became due, without notice of any defect, illegality or other infirmity in the same. The plaintiff therefore, not having participated in any violation of law, and having taken the note before its maturity for good consideration and without notice of any illegality in its inception, may maintain an action thereon against the maker. To hold otherwise would be to allow that party, who alone had been guilty of a breach of law, to set up his own illegal act as a defence to the suit of an innocent party. The view is supported by the judgments of all the courts, English and American, that have considered the question. *Begbie v. Levi*, 1 Cr. & Jerv. 180; S. C. 1 Tyrwh. 130. *Houliston v. Parsons*, 9 Upper Canada, 681. *Crombie v. Overholtzer*, 11 Upper Canada, 55. *Bank of Cumberland v. Mayberry*, 48 Maine, 198. *State Capital Bank v. Thomp-*

son, 42 N. H., 369. *Vinton v. Peck*, 14 Mich., 287. *Saltmarsh v. Tuthill*, 13 Ala., 390, 406. And it is in accordance with the decisions of this court upon notes made in violation of other statutes, except those against usury and gaming, which last have often contained peculiar provisions, and, as observed by Chief Justice SHAW, "declared that the note should be absolutely void to all intents and purposes, or, as is sometimes said, applied to the contract and not to the party." *Cazet v. Field*, 9 Gray, 329, 331. *Kendall v. Robertson*, 12 Cush. 156. *Williams v. Cheney*, 3 Gray, 215, 222, and 8 Gray, 206. *Phelps v. Decker*, 10 Mass., 267, 278. *Musson v. Fales*, 16 Mass. 332, 335.

Judgment for the Plaintiff.

[165 Mass. 389: 43 N. E. 187.]

1896.

Traders Nat. Bk. v. Steere.

(Syllabus.) If A conveys property to his creditor B, by a contract which is void as against public policy, in a particular which has no reference to creditors, C, another creditor, who has no greater right to maintain an action against B than A, cannot, after the contract has been fully executed, maintain a bill in equity against B, under Pub. Sts. §2 Ch. 11, and St. 1884 c. 285, to reach and apply the property in payment of his claim.

KNOWLTON, J. Under Pub. Sts. c. 151, § 3, this court has jurisdiction in equity to reach and apply in payment of a debt any property of a debtor liable to be attached or taken on execution in a suit at law against him, and fraudulently conveyed by him with intent to defeat, delay, or defraud his creditors. Under clause 11, § 2, of the same chapter, and under St. 1884, c. 285, it has jurisdiction to reach and apply in payment of a debt "any property, right, title or interest, legal or equitable, of a debtor, within this state, which cannot be come at to be attached or taken on execution in a suit at law against such debtor." If the property alleged to be in the hands of the defendants other than Phillips and Steere and Wheeler were property which the plaintiff had a right to take from them and apply in payment of its claims against Phillips, this court would have jurisdiction to give the plaintiff relief.

Upon the allegations of the bill, the contract whereby Phillips transferred his property to the other defendants was illegal, in that it provided for the suppression and concealment of evidence of a crime, and included an agreement not to prosecute him. Such a contract is against the policy of our law, and cannot be enforced in a court of justice. Atwood v. Fisk, 101 Mass. 363. Bryant v. Peck, 154 Mass. 460. But when it is fully executed, neither party to it can maintain an action to set it aside, or to re-

cover back anything that has passed under it. Myers v. Meinrath, 101 Mass. 366. Faxon v. Folvey, 110 Mass. 392. Atwood v. Fisk, ubi supra.

It becomes necessary to inquire whether there are allegations in the bill to show that the plaintiff has any better right than Phillips to maintain an action. The mere fact that the contract was illegal gives no such right. The conveyance of property by a contract which is void as being against public policy in a particular which has no reference to creditors, does not necessarily give creditors a right to pursue the property after the contract has been fully executed. Such a contract may or may not be fraudulent as against creditors. If it is, they may be set it aside; if it is not, they cannot. We may assume, in accordance with the decision in *Weeks v. Hill*, 38 N. H. 199, and in *Clark v. Gibson*, 12 N. H. 386, that if an insolvent person appropriates a considerable portion of his property for his own benefit, in a way forbidden by law, such an appropriation is *ipso facto* a fraud upon his creditors. Money taken by an insolvent person from his estate and paid to compound a felony is disposed of fraudulently as against creditors, and may be treated by them as still applicable to the payment of their debts. But the payment of one or more creditors in full by way of preference is not fraudulent at common law. It is not a misappropriation of the debtor's property. *Sawyer v. Levy*, 162 Mass. 190. Such a payment does not become fraudulent as against creditors merely because the creditor, when he receives payment and gives up the evidence of his debt, illegally promises as a part of the transaction to compound a felony of which the debtor is guilty. The added illegal element in the contract is condemned by the law because it is against public policy, but it does other creditors no harm. The money paid is no more than is due for the debt, and nothing is taken from the other creditors for an illegal use. See *Oriental Bank v. Haskins*, 3 Met. 332, 340; *Harvey v. Varney*, 98 Mass. 118, 120. They are affected as all other members of the community are affected,

and not otherwise. If it were possible to do so, they would have no right to use the debtor's liability to punishment for his crimes as a means of obtaining an advantage to themselves. *Taylor v. Jaques*, 106 Mass. 291. *Morse v. Woodworth*, 155 Mass. 233.

In the present case the plaintiff corporation does not allege that the conveyance of Phillips to other defendants was made "with intent to defeat, delay, or defraud his creditors." It, therefore, cannot rely upon an express intent to defraud them. There are not even allegations of fact from which such an intent could fairly be inferred. The plaintiff's case must stand solely upon the effect in law of such a conveyance as is set forth.

Now it is alleged that Phillips was indebted to each of the other defendants except Steere and Wheeler upon certain notes and drafts discounted for him, and that he agreed to transfer to them certain property, and they severally agreed to surrender to him the notes and drafts, and the writing which contained the evidence of his criminal fraud, and to conceal his fraud, and never to prosecute him for it. It is further alleged that this contract was executed on both sides according to its terms, and that the property was divided ratably among those to whom it was transferred. A fair interpretation of this part of the bill is that the proceeds of the transfer were accepted in payment and discharge of Phillips's indebtedness to the defendants, and it is entirely consistent with the allegations—indeed, it seems probable from the allegations—that the whole property was not enough in value to pay these claims in full. Certainly there is no allegation that there was more than enough to pay them, or that any of the debtor's property was misappropriated by using it unlawfully to obtain an advantage for himself. The law will not impute to a debtor, by reason of such a transaction, an intent to defeat, delay or defraud his creditors, nor treat the transaction as a violation of their legal rights.

The judgment in *In re Mapleback*, 4 Ch. D. 150, is in accordance with the view which we have expressed.

In that case a debtor owed one of his creditors one hundred pounds, and forged his name upon a bill of exchange for one hundred pounds more, which was discounted at a bank. Just before the bill of exchange became due, the debtor wrote to the creditor confessing his crime, and entreating him to furnish the money to enable the debtor to take up the bill and conceal the crime, and offering to make a conveyance of property as security for the entire indebtedness if he would consent to the arrangement. The creditor furnished the money, and took the conveyance as security for the amount, and also for his former debt. The chief judge in bankruptcy held that the transaction could be avoided by the assignee in insolvency of the debtor, but on appeal the Lords Justices, without expressly deciding whether the transaction was illegal, held unanimously that, if it was, the assignee could not take advantage of it, because it was not a fraud upon creditors nor a fraud against the bankruptcy law.

We are of opinion that the bill before us does not state enough to show that the transfer of the debtor's property was fraudulent as against creditors, and that therefore no cause is shown for setting it aside. *If it were avoided on the ground of illegality of another kind, the property would be found in the hands of the defendants, and the plaintiff would have no equity superior to that of the defendants or of other creditors in regard to the appropriation of it to the payment of Phillips's debts.* As is expressly held in *Weeks v. Hill*, 38 N. H. 199, the defendants would not be subjected to a penalty, and be deprived of their equities as creditors, because of their illegal contract in reference to the debtor's crime.

The plaintiff has no standing to maintain its suit under Pub. Sts. c. 157, on the ground of a fraudulent preference, because it is not proceeding under that statute. Even if the suit were by an assignee in insolvency, a fraudulent preference could not be set aside in insolvency proceedings commenced nearly two years after the conveyance was made.

Bill dismissed.

[7 Mich. 145.]

1859.

John S. Bagg v. George Jerome and Another.

Where a contract in violation of law has been carried into effect, the law will not aid either party to undo what has been done, and to divest a title that has passed.

A mortgage of intoxicating drinks under which possession has been taken by the mortgagee, can not be treated as void under the Prohibitory Liquor Law of 1855, as between the mortgagor and mortgagee, nor as between the latter and the creditors of the former, unless made to defraud such creditors.

Where a chattel mortgage, contains no unlawful provision, it can only be avoided by proof of fraud in fact, which is exclusively a question for the jury. If it were void on its face, it would be the duty of the court to pronounce it so; but the court can not look at facts outside the instrument, and treat them, when found by the jury, as a part of the instrument itself, or instruct the jury if they find such facts, that the mortgage is void; since to do so would be a mere evasion of the statute which refers the question of fraud to the jury.

That a chattel mortgage is given to a trustee to secure demands in favor of several creditors, instead of being given to the creditors themselves, and that it contains a provision that the trustee shall be liable in the premises for his own default or neglect only, are matters the jury may take into account in determining the question of actual fraud, but they do not render the instrument fraudulent in law.

MANNING, J.:

The first section of the act provides that no person shall be allowed to manufacture or sell any spirituous or intoxicating liquors. The second section declares all payments for such liquors shall be considered as having been received without consideration, and against law and equity; and that any money or thing paid therefor may be recovered

back by the person paying the same, his wife, or any of his children; and makes null and void, except as to *bona fide* purchasers without notice, all sales, transfers, grants, releases, quit-claims, surrenders, mortgages, &c., the consideration whereof, in whole or in part, shall have been the sale or agreement to sell such liquors.

At common law all contracts in violation of law are void. The law in such cases, will not aid either party, but leaves them to reap the reward of their own folly. Hence, if the contract is executory it will not enforce it, or give damages for a non-performance; and if executed, it will not undo what the parties themselves have done, by divesting the title that has passed. By the chattel mortgage and delivery the title to the property passed from Bayless to the defendants. It is good against Bayless; and also against his creditors, if not made for the purpose of defrauding them.

The statute provides for a recovery by the vendee, his wife, or any of his children, of the money or other thing given by him in consideration of the liquors, but it makes no provision whatever in behalf of the vendor, or his creditors, but leaves the seller of the liquors at common law. (See *Breck vs. Adams*, 3 Gray, 569.)

The only other question in the case was one of fraud, to be found by the jury. All conveyances made to hinder, delay, or defraud creditors, are void as to them, both at common law and under the statute. The statute, however, has changed the common law in one very important particular, and that is, in declaring the question of fraudulent intent in all such cases, to be a question of fact, and not of law.—Comp. L. 948, Sec. 3201. Before the statute the question of fraudulent intent—the facts being found by a jury—was one of law to be pronounced by the court. It is now, under the statute, a question of fact, to be found, like other facts, by the jury. Whether this change be

a salutary one or not, is not for us to say; it is sufficient that it is made the law of the land by statute. When the instrument, on its face, is one the law will not sanction against creditors, it is the duty of the court to pronounce it fraudulent as to them; but the court cannot look to matters *dehors* the instrument for that purpose. In such case, the fraud, if any, does not consist in the instrument itself, but in the abuse of it; or, in other words, in a party seeking to use it for purposes at variance with what the instrument declares on its face. For the court to treat such extraneous matters, when found by a jury, as a part of the instrument itself, or to instruct the jury that the conveyance is void, if they should find them, would, it seems to us, be nothing more or less than an ingenious device to evade or get around the statute.—See *Jackson v. Dean*, 1 Dough. Mich. 519; *Oliver v. Eaton*, *ante* p. 108.

The mortgage is an ordinary chattel mortgage with two exceptions. It is given to the defendants in error instead of the creditors of Bayless, who are mentioned, with the amount Bayless was owing each one of them, in the recital. And it contains a provision that the defendants in error "shall not be liable in the premises for anything except their own personal default and neglect."

These were matters proper for the jury to take into consideration, with the other evidence in the case, but we see nothing in them rendering the mortgage fraudulent. We are inclined to the opinion that the last clause does not lessen the liability of the defendants in error, as trustees.

The judgment must be affirmed with costs.

The other Justices concurred.

[56 Miss. 217 : 31 Am. Rep. 357.]

1878.

Block vs. McMurry.

1. *Sunday Contract. Cannot be sued on.*

If one by a horse from another on Sunday, the sale is void; but, it being a violation of the public law, the parties are in *pari delicto*, and neither has any remedy against the other on the contract.

2. *Same. Parties in pari delicto.*

The seller of a horse on Sunday cannot recover the animal back from the purchaser, or maintain trover for its value, on the ground that the contract was void and that no title passed.

3. *Same. Parties not in pari delicto.*

If the seller of a horse on Sunday was made drunk by the purchaser thereof, for the purpose of defrauding him, the parties were not *in pari delicto*, and the seller can recover his horse.

SIMRALL, C. J., delivered the opinion of the court.

The proof is that McMurry sold and Kernaghan bought the horse in question on Sunday, Kernaghan paying the price and taking the horse into possession on that day. On the next day, Monday, the testimony tends to show that McMurry made a bill of sale to the wife of Kernaghan, at his request, because there was a judgment against him.

An effort was made to prove (both sides offered testimony on the point), that, at the time of the sale, McMurry was very much intoxicated, so much so that he was incapacitated understandingly to make a contract; and, further, that he was got into that condition by Kernaghan and his associates, so as to take advantage of him.

Block afterwards bought the horse from Kernaghan, and this action of trover and conversion was brought against him by McMurry.

Two propositions have been argued by counsel; first, as to the effect of the statute on transactions had on Sunday; second, whether McMurry was incompetent

to contract, on account of drunkenness. It has been uniformly held, under statutes like ours, that a contract of sale made on Sunday is void. It has been several times so declared in this State. *Hoover v. Pierce*, 26 Miss. 627; *Kuntz v. Price*, 40 Miss. 341; *Miller v. Lynch*, 38 Miss. 346. The cases have generally been suits on the contract itself, or some stipulation connected with it, as in *Murphy v. Simpson*, 14 B. Mon. 419, where there had been what in common parlance is called a "horse swop." Each warranted the soundness of the animal which he exchanged. It was held that an action could not be brought on the warranty.

The authorities, without exception, lay down the rule that the contract, if not within an exception, is void, because it is made a misdemeanor, and punishable, to do secular business on Sunday, which amounts to a prohibition.

This case presents a question which lies behind that. The seller insists that, since the sale is void, no title to the horse passed to Kernaghan, and therefore he has a right to reclaim it or to recover damages for the conversion, either against Kernaghan or any vendee from him. The argument is, if the transaction is utterly void, the original rights of neither party have been affected. It is as though no sale had been made. If the buyer has given an obligation for the price, it is not binding. If he has got possession of the chattel, the possession is without right to support it.

There are adjudged cases which have so ruled, *Dodson v. Harris*, 10 Ala. 569; *Adams v. Gay*, 19 Vt. 458, cited from note to 2 Pars. on Con. 764. But these authorities rest on a misconception and misapplication of the principle and the reason of it. When it is declared that the Sunday contract of sale is void, the precise extent of that doctrine practically is, that the courts will not give the remedies of the law to assist either party engaged in the illegal transaction. They will not help the seller to recover the price; nor can

the buyer maintain an action on any warranty, deceit, or fraud in the sale.

In such case, the seller has parted with his property for the obligation of the buyer, solvable in the future. The courts will lend the seller no aid to get what he was promised for his horse. If all redress is denied to the seller, the principle, in its full and just application, would deny a reclamation by the buyer of the price which he had paid, and to the seller the chattel which he had delivered.

The law observes a strict and impartial neutrality; it will not interpose at the solicitation of either party, but says to both: "This transaction was a violation of the statute; both of you are equally guilty, and each of you must remain in the position in which you have placed yourselves."

The cases of *Dodson v. Harris*, 10 Ala., 569, and *Adams v. Gay*, 19 Vt. 358 (the latter cited from note to 2 Pars. on Con. 764), hold that, the contract of sale being void, if the property has been delivered, the seller may, on another day, demand the property, and, if not returned, may bring trover; but that the possession being permissive, there must be actual demand before suit brought. These authorities refer to cases which hold, that though the note for the property cannot be recovered upon, yet if there is a subsequent promise, that may be the basis of a recovery.

The better doctrine is announced in *Smith v. Bean*, 15 N. H. 578; that is, that when it said the contract is void, it has reference to the question whether there is any legal remedy upon it. "The purchaser has "possession as of his own property, by the assent "of the seller, and the law leaves the parties where "it finds them." The reason was clearly and forcibly stated by Lord MANSFIELD in *Holman v. Johnson*, Cowp. 343: "The object of the statute is for the "benefit of the public, and not the advantage of the "defendant." "It is founded on the policy that no

" court will lend its aid to an illegal act. The parties " will be left where they placed themselves," etc.

The courts of Massachusetts once announced principles in accord with the cases cited from Vermont and Alabama. But the later cases distinctly repudiate that doctrine. Thus, in *Myers v. Meinrath*, 101 Mass. 368, which was trover, brought by a plaintiff who had returned the property which he had received against the other party, who retained what he had got in exchange, the action was not allowed.

In *Horton v. Buffington*, 105 Mass. 399, an attachment would not lie on the property in the hands of a third person, who obtained it from a Sunday purchaser as the property of the original owner, for the reason that the disability of the original owner to reclaim would avail the party holding as a sufficient title. See *Chitty on Con.* (10th Am. ed.) 732.

The courts leave the parties alone, not on any idea of giving effect to the illegal contract, but because it imputes disability to the parties of asserting any right to recover. The series of instructions on behalf of the plaintiff, affirming a right in McMurry to recover because the sale was void, are erroneous.

If the jury should be satisfied that McMurry was intoxicated to the degree that he was not competent to understand the nature and quality of the business, or to make a contract, then the parties are not *in pari delicto*, and he would not be bound by the sale, although made on Sunday.

Judgment reversed and cause remanded.

[67 Miss. 540; 7 So. 501.]

1890.

Foster v. Wooten.

1. SALE. *Personal property. Bill of sale executed on Sunday.*

The execution on Sunday of a bill of sale of personal property, in pursuance of a sale made on Friday, does not affect the validity of the sale.

2. SAME. *Sunday. Executed contract. In pari delicto.*

In such case, the property being delivered, a creditor of the seller cannot, by attachment, afterwards subject the property to his debt upon the ground that, the sale being a Sunday contract, the title did not pass to the purchaser. Granting this to be a Sunday contract, it being executed, the law in such cases is absolute non-action. *Block v. McMurry*, 56 Miss. 217.

3. ANIMALS, *Death of, pending litigation.*

A claimant bonding animals attached, who is without fault, is not liable for the death of the same pending the litigation.

WOODS, C. J. delivered the opinion of the court.

The evidence showed quite clearly that the sale of the stock by L. D. Lewis to A. F. Foster, occurred on Friday. The execution of the bill of sale on the Sunday following was not the consummation of the sale; it was only the manufacture of the evidence of the antecedent sale. If we shall concede, however, that this sale took place on Sunday, we will still be constrained to hold that the third instruction for the plaintiff in attachment was improperly given. Any charge to the jury, considered as a mere abstract proposition, could not rightfully influence the verdict, looking at the uncontroverted facts of the case. This was an executed contract; the stock had been delivered to A. F. Foster, and the

purchase-price paid by him to L. D. Lewis, long before the attachment writ was levied. **Grant, then, that the sale was made on Sunday, what is the rule of law on such state of facts? Nothing more than absolute non-action. It will give neither party to the contract any assistance, nor listen to any complaint. It will leave the parties where it finds them. That is the extent of the rule. It cannot be reasonably insisted that the seller of the stock, L. D. Lewis, could have made any maintainable appeal to any court for the annulment of the trade, and the recovery of the stock. Equally in fault with the buyer, A. F. Foster, the law would decline to afford him any countenance, leaving him just where it had found him, and where his own act had placed him.** With what show of reason can it be contended that the attaching-creditor of L. D. Lewis could take any step for the assertion of any claim to the stock, thus wrongfully sold on Sunday, which L. D. Lewis himself could not take? But this whole question has been too long and too firmly settled to be now disturbed. Neither L. D. Lewis, nor the attaching-creditor could dispossess the Sunday purchaser, or any purchaser under him. See *Block v. McMurry*, 56 Miss., 217, and cases there cited.

It follows, therefore, that the third instruction of the court below for plaintiff in attachment, to the effect that sales of personal property made upon Sunday are void and pass no title to the property, was erroneously given, and was misleading. Granting its correctness in the abstract, in the concrete it was eminently and unwarrantedly prejudicial to the claimant on the trial of her issue. It was doubtless regarded by the jury, and with reason, too, as informing them that the Sunday sale from L. D. Lewis to A. F. Foster being void, and no title having passed thereby, that the title to the stock levied upon was still in said

Lewis, and that said stock was therefore to be subjected to plaintiff's demand, and the issue found against the claimant, the sub-purchaser. This was altogether misleading. The fact (though it was not the fact, as shown by the evidence) that the sale of the stock was made by L. D. Lewis to A. F. Foster on Sunday, had absolutely nothing to do with the case.

The contention of appellant as to the amount of the verdict, is likewise well taken. The jury returned a verdict for the full value of all the horses, though it was undisputed that the two best animals had died, pending the litigation, without fault on the part of the claimant. The court partially remedied this error of the jury by requiring a remittitur of the price of one of the deceased animals, but appears to have taken no account of the other horse, shown to have died also. The verdict therefore remained excessive.

Reversed.

[100 Mo. App. 540 : 75 S. W. 380.]

Bruer v. Kansas Mut. Life Ins. Co.

(Court of Appeals at Kansas City, Mo. May 25, 1903.)

Life Insurance—Assignment of Policy—Invalidity—Recovery of Premiums.

1. A life insurance policy was assigned to plaintiff, under an agreement with the beneficiary that plaintiff should receive a certain amount of the insurance in consideration for paying the premiums. The insurance company, on becoming aware of the contract, denied the validity of the assignment, and plaintiff sued to recover the premiums paid by him. *Held*, that, plaintiff's right being founded on his illegal contract with the beneficiary, and not on the contract of insurance, he could not recover on the ground that the contract of insurance was executory, and that plaintiff could retire from it at any time.

Appeal from Circuit Court, Jackson County ; James Gibson, Judge.

Action by Conrad Bruer against the Kansas Mutual Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

R. T. Herrick and I. P. Ryland, for appellant.

J. H. Orr, W. B. Cline, and J. L. Lorie, for respondent.

An action will lie to recover back money paid under an illegal agreement at any time before the agreement is carried out. Anson on Contracts, *264, bottom; Anson on Contracts, *201 ; Anson on Contracts, 267, and note, citing *Taylor v. Bowers*, 1 Q. B. D. (C. A.) 300. This is the leading English case on this subject. *Mount v. Waite*, 7 Johns. 434; *Wheeler v. Spencer*, 15 Conn. 28; *Shannon v. Baumer*, 10 Iowa, 210; *House v. McKenney*, 46 Me. 94; *Bank v. Wallace*, 61 N. H. 24; *Skinner v. Henderson* 10 Mo. 205 ; *Hickerson v. Benson et al.*, 8 Mo. 8, 11, 40 Am. Dec. 115 ; *Adams Express Co. v. Reno*, 48 Mo. 264, 15 Am. & Eng. Ency. of Law (2d Ed.) pp. 1004-1007, and notes and cases cited, subject, " *Illegal Contracts* " ; *Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347 ; 2 Parsons' Contracts, p. 746. A contract of

life insurance remains executory until the death of the assured. 16 Am. & Eng. Ency of Law (2d Ed.) 840; *Cohen v. Ins. Co.*, 50 N. Y. 610, 10 Am. Rep. 522; Clark on Contracts, p. 1; Schumaker & Longsdurf's Encyclopedic Law Dictionary, 202; 1 Wharton on Contracts, par. 50; 7 Am. & Eng. Ency. of Law (2d Ed.) 95.

* * * * * *

Ignorance of the illegality of a contract, where there is no moral turpitude, is strong ground for granting relief to the party seeking relief on that ground. 15 Am. & Eng. Ency. of Law (2d Ed.) 1004, 1005, and cases cited from 20 states; *Palace Car Co. v. Transportation Co.* (C. C.) 65 Fed. 158; *Hogben v. Insurance Co.*, 69 Conn., 503, 38 Atl. 214, 61 Am. St. Rep. 53.

Upon the well-founded principles of equity and right plaintiffs should recover the amount paid out by him as premiums. *Supreme Lodge of Knights of Honor v. Metcalf* (Ind. App.) 43 N. E. 893; *Downey v. Hoffer*, 110 Pa. 109, 20 Atl. 655; *Cheeves v. Anders*, 87 Tex. 287, 28 S. W. 274, 47 Am. St. Rep. 107; *Ferry Co. v. Ry. Co.*, 73 Mo. 389, 39 Am. Rep. 519; *McKee v. Phœnix Ins. Co.*, 28 Mo. 383, 75 Am. Dec. 129; 19 Am. & Eng. Ency. of Law (2d Ed.) p. 99; *Green v. Corrigan*, 87 Mo. 370.

ELLISON, J. The defendant issued a life insurance policy, whereby it insured the life of Mrs. Mercy A. Carey in favor of her son, C. E. Carey, in the sum of $3,000. Afterwards Mrs. Carey and her son assigned the policy to plaintiff. On the day of the assignment, and in connection with it, plaintiff and C. E. Carey entered into a contract whereby it was agreed that plaintiff should pay the premiums on said policy, and on the death of Mrs. Carey he should secure $2,000 of the sum payable in the policy, and C. E. Carey should receive the remaining $1,000. Under this contract, plaintiff paid to the company three quarterly premiums, amounting to $174.39. The defendant assented to the assignment under the impression that plaintiff was a creditor of the insured; but, when it learned of the facts upon which the assignment was based, it wrote plaintiff that it was not lawful for him to take an assignment of the policy merely in consideration of his advancing money to keep up the insurance. After-

wards the company denied any liability to plaintiff; that is to say, denied the validity of the assignment and contract therewith, or that it would become liable to pay plaintiff any part of the policy on the death of Mrs. Carey. The company also denied plaintiff's right to a return of the premiums he had paid. Plaintiff thereupon instituted this action to recover such premiums, and prevailed in the trial court.

Plaintiff had no insurable interest in Mrs. Carey, as a creditor or otherwise, and it is conceded that the contract of assignment, made as stated, was void, as against the policy of the law. We think that plaintiff ought not to be allowed to recover. His right of action is necessarily based on an illegal contract, and being so, he is shut off from aid at the hands of the courts. To prove his case against the defendant, he must necessarily rely upon the manner of his ownership of the policy. In investigating that question, the consideration leading thereto and supporting such ownership would be brought out, and thus his own illegal and wrongful conduct be made to appear.

His case in the brief in his behalf is put upon the idea that the contract of insurance is executory until the death of the assured, and that he has a right to retire from the contract at any time before it becomes executed. The principle of law is not applicable to the facts. The contract whereby he became a party to the transaction was executed. The only thing which gave him any right or interest in the transaction, and upon which he must depend to sustain his claim, in his wrongful act, and it precludes him from obtaining redress at the hands of the law.

We have examined the authorities cited by plaintiff, and have gone over the reasons assigned by him in support of the judgment; and, while not questioning many of the statements of legal principles, we deny their application. The authorities relied upon by defendant will be found collected in briefs of counsel.

The judgment is reversed. All concur.

[46 Neb. 477 : 65 N. W. 195.]

1895.

Storz et al. v. Finkelstein et al.

(Supreme Court of Nebraska, Dec. 7, 1895.)

Contracts—Illegal Considerations—Right of Action.

1. No action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law.
2. Plaintiff sued the defendant for the purchase price of beer, to which the defendant, by way of counterclaim, pleaded payment for a license to sell beer, which as defendant alleged plaintiff had agreed to furnish, to enable defendant to make such sales. By reply, plaintiff alleged a custom, in accordance with which a retail traffic in beer had been carried on by defendant under and by virtue of a license held by the plaintiff, which traffic, in legal effect, was a violation of the statute of Nebraska regulating traffic in liquors. *Held* that, for the purchase of beer sold under these circumstances, plaintiff was not entitled to a recovery against the defendant.
(*Syllabus by the Court.*)

Error to district court, Douglas county; KEYSOR, Judge.

RYAN, C. This action was brought by the plaintiffs in error, a partnership firm, engaged in the manufacture of beer, to recover of defendant the sum of $707.06, the price of certain beer alleged to have been furnished by plaintiffs to defendant in the month of June, 1889. By way of counterclaim the defendant alleged that the beer was furnished him by plaintiffs under a written agreement, which required that the plaintiffs should furnish the license necessary under the laws of Nebraska, that plaintiffs had neglected to provide this license, and that, in consequence of such neglect, the defendant had been required to pay the sum of $1,000 for such license. By reply, the plaintiffs averred that,

if the defendant had taken out a license, it was to enable him to sell vinous and spirituous liquors, and not to enable him to perform his contract with the plaintiffs. There was, also, in the reply this language: "The plaintiffs further allege that there is, and has been since long before September 1, 1888 [the date of a written contract between plaintiffs and defendant] a usage and custom existing and prevailing among brewing companies generally, and particularly in the State of Nebraska, and in the city of Omaha, for each of said brewing companies to operate, in connection with its brewery, a bottling department for the purpose of bottling beer of its own manufacture exclusively; that under said usage and custom said bottling department had been conducted under the liquor license issued to the brewery, and through an agent who receives beer from the brewery, at a fixed price, and who operates the bottling department as a part of and in the interest of the said brewery; that the contract referred to in the defendant's answer was entered into by the plaintiffs and the said defendant with knowledge of and with reference to said usage and custom; and that said usage and custom thereby became and is a part of said contract." Upon the trial defendant admitted that he owed plaintiffs the amount claimed, and a verdict was accordingly returned. Thereupon defendant moved for a dismissal of the plaintiffs' action, and for a judgment for costs, for the reason that "the pleadings, upon their face, show that the sales for which plaintiffs sought to recover were made in pursuance of an unlawful contract between the plaintiffs and the defendant, and for the further reason that the contract under which the sales were made contemplated the resale of said beer by the defendant, with the intent and for the purpose, on the part of the said plaintiffs, of enabling the defendant to resell contrary to law." This motion was sustained, and the judgment was accordingly rendered against the plaintiffs for costs.

From the fact that the plaintiffs brought suit for the

price of the beer agreed upon between themselves and the defendant, it is clear that the defendant was not a mere agent for the sale of the plaintiff's beer. The petition was framed upon the theory that plaintiffs had sold the defendant the beer for which suit was brought, through the use of the word "sale" or any equivalent term was avoided. It is equally clear that, as a retail vendor of liquor, the defendant was, by section 25, c. 50, Comp. St., required to pay a license of $1,000; his place of business being, as it was, in the city of Omaha. By the reply there was alleged a custom, with reference to which the parties litigant had contracted, whereby the obligation to pay the required license was avoided, which arrangement was clearly in violation of the statute above referred to. The plaintiffs, however, insist that, since the defendant had admitted that he had obtained the beer from plaintiffs, and was owing that amount, judgment should have been accordingly rendered. This admission did not amount to a confession of judgment, neither did the verdict thereon returned, restricted, as the jury was, by the instruction of the court that the counterclaim was not by them to be considered. The question whether or not a recovery should be had by one of the two parties to a contract for the violation of a statute still remained open for determination by the court upon the pleadings. Whether or not this question was correctly decided by the court is the only one with which we are concerned. The plaintiffs have cited only one adjudged case which is directly in point, and, as the principle upon which that case proceeds must be far-reaching in its effects, the extent of its recognition, as well as its soundness, will now be considered at some length.

The case referred to is *Manchester & L. R. Co. v. Concord R. Co. (N. H.)* 20 Atl. 383, in which there is quoted, with approval, the following language, found in 2 Mor. Priv. Corp. Sec. 721: "If an agreement is legally void and unenforceable by reason of some statutory or common-law prohibition, either party to the agreement, who has received anything from the other

party, and has failed to perform the agreement on his part, must account to the latter for what has been so received. Under these circumstances, the courts will grant relief, irrespective of the invalid agreement, unless it involves some positive immortality, or there are other reasons of public policy why the courts should refuse to grant any relief in the case. * * * These doctrines have been repeatedly applied in suits arising out of contracts entered into by corporations, although prohibited by statute or by the common law; and, although the contracts are held illegal and unenforceable in these cases, a recovery was allowed to the extent of the consideration received." A review of the authorities cited in support of these propositions does not tend to establish the doctrine announced. It was held, in *White vs. Bank*, 22 Pick., 181, that a suit could be maintained upon an entry in a deposit book made by the defendant's cashier, by which, in effect, the bank became bound to pay at a future time the amount of plaintiff's deposit, because the statute of Massachusetts prohibited banks from assuming such liability. In the opinion we find the following language: "The second objection, and that on which defendant's counsel principally rely, proceeds on the admission that the contract is illegal; and they insist that, where money had been paid by one of two parties to the other, on an illegal contract, both being *participes criminis*, no action can be maintained to recover it back. The rule of law is laid down by Lord KENYON in *Hawson vs. Hancock*, 8 Term R., 577, and in other cases. This rule may be correctly stated in respect to contracts involving any moral turpitude, but when the contract is merely *malum prohibitum* the rule must be taken with some qualifications and exceptions, without which it cannot be reconciled with many decided cases The rule, as stated by Comyns, in his treatise on contracts, will reconcile most of the cases which are apparently conflicting: 'When money has been paid upon an ille-

gal contract, it is a general rule that, if the contract be executed, and both parties are in *pari delicto*, neither of them can recover from the other the money so paid; but if the contract continues executory, and the party paying the money be desirous of rescinding it, he may do so, and recover back his deposit by action of *indebitatus assumpsit* for money had and received. And this distinction is taken in the books, namely, where the action is taken in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and, instead of endeavoring to enforce it, presumes it to be void, and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law that the plaintiff should recover.' 2 Com. Cont. 109." The inhibition of the statute was with reference to the incurring by the bank of an indebtedness payable at a future day certain. The entry in the deposit book was as follows: "Dr. Franklin Bank in account with B. F. White. Cr. 1837, Feb. 10th, to cash deposited, $2,000. The above deposit to remain until the 10th day of August. E. F. Bunnell, Cashier." This entry was held to be within the inhibition of the statute. The party forbidden was the one which violated the provisions of the statute. The depositor was by no means in *pari delicto*. Therefore, he was held entitled to recover the amount of his deposit. This distinction in principle was recognized in principle was recognized in Bank v. Codd, 18 N. Y. 240, and the liability of the defendant was accordingly adjudged to exist.

The action in *Dill v. Inhabitants of Wareham*, 7 Metc. (Mass.) 438, was to recover back the sum of $500, paid by the plaintiff to the town of Wareham for the privilege of taking oysters within the limits. The power of the town to grant the privilege was denied by the statute, and, upon the refusal of the town to allow

the privilege paid for, the suit was brought, as indicated. Chief Justice SHAW, in delivering the opinion of the court, said: "In regard to the sum of $500, as it appears that it was received by the treasurer, and went to the use of the town, and was so received in advance, upon a consideration which has failed, it must be regarded as money had and received by the town to plaintiff's use, and, therefore, the action for that sum will lie." In *Espiscopal Church of Dedham*, 1 Pick., 372, a note had been given by the rector and wardens of the church, upon request of the church society, which money had been not only borrowed for, but had been used by, the church society, and it was held that such society was bound to pay the amount so borrowed, even though there existed no direct legal authority in the rector and wardens to bind the church. As will be seen by the title of this case, it was an action by the lender of the money to recover the amount loaned. Hence, the principle laid down by Mr. Morawetz, even if abstractly correct, was not applicable, as it might have been if the rector and wardens, after having paid the note, had sued the church society to recover the amount so paid. The syllabus in Whitney v. Peay, 24 Ark., 22, begins with the statement: "The state issued bonds for the use of the Real Estate Bank, the bonds being prohibited by law from being sold for less than the par value thereof." But this proposition cuts no special figure in the case; for, these bonds having been pledged as security for a loan, the sole questions determined were as to the rights and liabilities of the original pledgee and his assignee of the pledge, and of assignee of such assignee, among themselves, as to the respective loans on the property pledged. The court held that the bonds must be returned to the original pledger upon payment of the amount to secure which, originally, such pledge was made, notwithstanding the fact that, by subsequent pledges of the bonds, a loan of a larger sum had been effected. The recovery of judgment in Loan Co. v. Towner, 13 Conn., 249, was for an amount loaned

in Pennsylvania. It was held, in this case, that the laws of Pennsylvania should govern, and that, as the charter of plaintiff had provided that "nothing therein contained should be construed to authorize the company to discount notes," the loan of money upon which the interest was reserved in advance constituted a discount and that, therefore, no recovery could be had upon the note. The right of the loan company to recover judgment upon another theory, which was recognized by the supreme court of errors of Connecticut, is thus fairly stated in one paragraph of the syllabus: "Where a corporation, having power to sue and be sued, and to loan money under certain restrictions, made a loan, and afterwards took a note as security, in contravention of the provisions of its charter, it was held, in a suit on such note with the money counts, that, although there could be no recovery on the note, the money loaned, with the legal interest, might be recovered on the money counts." This principle was the only one involved in *Vanatta v. Bank*, 9 Ohio St. 27. In *Foulke v. Railroad Co.*, 51 Cal. 365, the opinion was very brief, and was correctly summarized in this language of the syllabus: "The provision in the act concerning railroad corporations, that 'no contract shall be binding on the company unless made in writing,' refers only to contracts wholly executory; but the action against the corporation on such verbal executory contract must be brought upon an implied promise, and the recovery must be limited to the value of the benefit received by the corporation."

The lease of a certain part of a line of railroad was not authorized by the stockholders of the company by which said line was owned, as required by statute, and said lease was, therefore, held void. Inasmuch as the transaction was not tainted with any immorality, a recovery of just compensation for the use of the road was allowed without reference to the unauthorized lease. *Farmers' Loan & Trust Co. v. St. Joseph & D. C. R. Co.*, 1 McCrary, 247, 2 Fed. 117. In *Madison Ave. Baptist Church v. Baptist Church in Oliver St.*,

73 N. Y. 82, there had been an attempted union of the two church societies, under an agreement that one should be merged in the other, which should be bound for and pay the debts of both. This was *ultra vires*, but, while the arrangement existed, it was supposed by all parties to be binding, debts were paid by the church supposed to be the sole survivor for the church supposed to have been merged in it. The court of appeals held that, for money so paid, the church whose debt had been thus paid was liable. In *Tracy v. Talmage*, 14 N. Y. 162, it was held that, although the vendor was a party to the illegal contract, he was not *in pari delicto*, within the rule which forbids the court to grant one party to an illegal contract or transaction relief against the other, and that, where parties to a contract or transaction, not *malum in se*, but prohibited by a statute, are not equally guilty, courts may afford relief to the less guilty party. In *Express Co. v. Lucas*, 36 Ind. 361, it was held that an agent who had received money for which the company was liable could not, as a defense to an action of the company, his principal, set up that his said principal had failed to file in the proper recorder's office a statement of the capital employed in its business, as required by statute.

From this review of the principal authorities cited to sustain the rules quoted from 2 Mor. Priv. Corp. Sec. 721, it is shown to be extremely probable that no court, except such, perhaps, as may have been misled by his statements, has ever enforced the aforesaid principle, laid down by Mr. Morawetz, "that, if an agreement is legally void and unenforceable, by reason of some statutory or common-law prohibition, either party to the agreement who has received anything from the other party must account to the latter for what has been so received." *Equally without judicial sanction is his next proposition,* that, "under these circumstances, the courts will grant relief, irrespective of the invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant any relief in the

case." The correct rule was quoted from the language of Lord MANSFIELD, in *Holman v. Johnson*, 1 Cowp. 343, by EYRE, C. J., in *Lightfoot v. Tenant*, 1 Bos. & P. 551. This language is as follows: "The objection that a contract is immoral or illegal sounds at all times very ill in the mouth of a defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff,—by accident, if I may so say. The principle of public policy is this, '*Ex dolo malo non oritur actio*'. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise '*ex turpi causa*', or the transgression of a positive law of this country, there the court says he has no right to be assisted." After this introduction, Lord MANSFIELD stated the question to be "whether the plaintiff's demand is founded upon the ground of an immoral act or contract, or upon the ground of his being guilty of anything which is prohibited by a positive law of this country." These clearly-stated principles were recognized and enforced in *Spurgeon v. McElwain*, 6 Ohio, 442; *Banchor v. Mansel*, 47 Me. 58; *Hubbell v. Flint*, 13 Gray, 277; *Hull v. Ruggles*, 56 N. Y. 424; *Skiff v. Johnson*, 57 N. H. 475; *Aiken v. Blaisdell*, 41 Vt. 655; *Foster v. Thurston*, 11 Cush. 322; *Hooker v. De Palos*, 28 Ohio St. 251; *Ruckman v. Bryan*, 3 Denio, 340; *McKinnell v. Robinson*, 3 Mees. & W. 434; *Mosher v. Griffin*, 51 Ill. 184; *Raymond v. Leavitt*, 46 Mich. 447, 9 N. W. 525. In *Wilde v. Wilde*, 37 Neb. 891, 56 N. W. 724, an action for divorce, the rule was applied that the courts will refuse to enforce contracts which are manifestly contrary to public policy or sound morals. The following language is quoted from *Luce v. Foster*, 42 Neb. 818, 60 N. W. 1027: "When any portion of the consideration is illegal, the promise cannot be enforced, unless there are several promises, and that which relates to the bad consideration can be dis-

tinguished and separated from the others. In other cases the promise is unenforceable. All the text writers so state the rule. See, for instance, Whart. Cont. 339; Anson, Cont. 191; Pol. Cont. 338. The rule is so well settled that a reference to adjudications is unnecessary."

The first paragraph of the syllabus of *Gould v. Kendall*, 15 Neb. 549, 19 N. W. 483, is as follows: "No court of law or equity will lend its assistance in any way towards carrying out an illegal contract. Therefore, such contract cannot be enforced by one party against the other, either directly, by asking the court to carry it into effect, or indirectly, by claiming damages or compensation for a breach of it." In the body of the opinion of the case last cited there is an analysis of the case of *Brooks v. Martin*, 2 Wall. 70, which by the supreme court of New Hampshire in *Manchester & L. R. Co. v. Concord R. Co. supra*, was cited as a leading case in support of the erroneous doctrine is stated in Section 721, Mor. Priv. Corp. By this analysis it was clearly shown by Judge COBB that, in the case of *Brooks v. Martin*, a recovery was sanctioned, chiefly because, between the parties litigant, there had existed a partnership, and the property of the partnership had been the product of the money furnished by the party who had brought the suit. The discussion of this proposition may be fittingly closed by quoting from the above-mentioned opinion, delivered by Judge COBB, his quotation from the language of Chief Justice MARSHALL, in *Armstrong v. Toler*, 11 Wheat., 268, as follows: "Questions upon illegal contracts have arisen very often, both in England and in this country; and no principle is better settled that no action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law." No argument is necessary to illustrate the applicability of the rule just quoted to the facts of this case. *The judgment of the District Court is affirmed.*

IRVINE, C., did not take part in the determination of this case.

[15 N. H. 577.]

1844.

Smith vs. Bean.

A contract for the sale of goods, to be thereafter delivered, was made on a Sunday, and leave was, on a subsequent Sunday, given the vendee to take them.—*Held*, that his possession, acquired on Monday following under such license, and in pursuance of the contract, was good, not only against the vendor, but against the creditors of the vendor also.

Trespass, for taking a pair of oxen. The claim was submitted to referees, who reported that one Boies on the 20th of February, 1836, being Sunday, for a valuable consideration sold the oxen to the plaintiff, to be delivered afterwards. On a subsequent Sunday, Boies agreed that the plaintiff might send and take them from a certain pasture. He did so on the next day. A few days after, the defendant attached them as the property of Boies in the possession of the plaintiff. On these facts the referees awarded that the plaintiff recover a sum named as damages and costs, unless the court should be of opinion that the sale from Boies to the plaintiff was not such a one as would enable the plaintiff to hold the oxen against the attachment; in which case they awarded costs to the defendant.

Parker, C. J. The contract of sale by Boies to the plaintiff was made on the Sabbath. The plaintiff took possession of the oxen on Monday. If Boies had delivered them on that day, the completion of the sale by the delivery being lawful, it would not have formed a legal objection to the sale, that the negotiation respecting it, ending in an agreement to make it, took place at a time when secular labor was forbidden and unlawful. The contract would have been executory until perfected by the delivery, and the perfected contract of sale would have been lawful and binding.

But the report shows no delivery of the oxen by Boies on Monday. The plaintiff took possession of

them on that day; but it was by the direction or permission of Boies, given on the previous day. All that was done by Boies was done on Sunday. If he sold the property, then it was on that day. The contract of sale was made on that day, and the plaintiff took possession of his purchase the next day. If Boies were now seeking to recover the purchase money, we must on these facts hold the sale to have been illegal, giving the vendor no right of action.

It is generally said of such an illegal contract that it is void. 1 Taunt. 175, *Drury vs. De la Fontaine; Allen vs. Deming*, (14 N. H. Rep. 133, 137, 138,) and cases there cited. *Lewis vs. Welch*, (ditto 294, 298.) If this there so, and the contract, in the broad sense of the term, were void, no property would pass by it; the vendor might reclaim the property at will, and being his property it would be subject to attachment and levy by his creditors, in the same manner as if the attempt to sell had never been made.

But this is not what is intended by such phraseology. The transaction being illegal, the law leaves the parties to suffer the consequences of their illegal acts. The contract is void, so far as it is attempted to be made the foundation of legal proceedings. The law will not enterfere to assist the vendor to recover the price. The contract is void for any such purpose. It will not sustain an action by the vendee upon any warranty or fraud in sale. It is void in that respect. The principle shows that the law will not aid the vendor to recover the possession of the property, if he have parted with it. The vendee has the possession, as of his own property, by the assent of the vendor; and the law leaves the parties where it finds them. If the vendor should attempt to retake the property, without process, the law finding that the vendee had a possession which could not be controverted, would give a remedy for the violation of that possession. When then it is said

that the contract is void, the language is used with reference to the question whether there is any legal remedy upon it. (See 5 Barn. & Cres. 406, *Fennell vs. Ridler*, opinion of BAYLEY, J.

The principles to which we have referred settle this case. The plaintiff received the oxen, with the assent of Boies, upon a contract of sale which in effect passed the property as between them, whether the plaintiff paid or not; and if he did not, whether Boies can recover the price of him, or not, is immaterial.

The plaintiff is entitled to hold the oxen against Boies, and may therefore hold them against the creditors of Boies, unless the sale was fraudulent as to creditors. The fact that it was illegal, because against the policy and prohibitions of the law, does not show that it was fraudulent as against creditors; and there is nothing in the case to show actual fraud. The case is within the principle of *Clark vs. Gibson*, 12 N. H. Rep. 386.

Judgment for the plaintiff.

[23 N. H. 128.]

1851.

White v. Hunter.

It is a well settled rule of law, as to all acts and contracts which are unlawful on account of their immorality, or their tendency to promote it, or because they are hostile to the public policy, that the parties thereto are regarded as being in pari delicto, and that in all such cases, the rule of law is, portior est conditio possidentis.

Money paid upon a contract, of the character before stated, cannot be recovered back by the party who paid it.

There is no sound distinction between the case of money paid, and that of land conveyed, upon such a consideration.

In such case, neither the grantor in his life-time, nor his heir after his decease, can recover possession of the land conveyed, against the grantee.

Accordingly, where O. W. had been living in adultery or fornication, with one H. W., and the said O. W., being seized of a tract of land, conveyed it to one H., by a deed executed by himself and said H. W., *and the object and purpose of the conveyance was to provide for the support of the said O. W. and H. W., during their lives,* in the same unlawful intercourse,—it was *held* that *O. W., if alive, could not maintain an action to recover possession of the land, against H.*, and that his son and heir, standing upon the right and title of his ancestor, as it existed at his decease, could not recover the same against the said H.

WOODS, J.:

Oliver White, it is conceded, was once the owner of the premises in question. Both parties claim to have derived title from him. The defendant claims under a deed from said White, duly executed, acknowledged and recorded, in virtue of which she entered and took possession of the premises.

The plaintiff makes title to the premises, as son and heir of Oliver White, and to avoid the effect of the deed to the defendant, claims that the same was given

upon an illegal and immoral consideration, being given for the purpose of upholding and promoting the unlawful and immoral conduct, and facilitating the illicit intercourse of Oliver White, and the so called Hannah White.

It is claimed that the deed of Oliver White is invalid, for the reason that it rests upon an immoral consideration, and the transaction, out of which it grew, is against public policy. And no doubt exists that the consideration is as vicious and unlawful as it is claimed to be.

It appears, however, that in the transaction thus characterized, White, the plaintiff's ancester, was *particeps criminis ;* that he and the defendant were *in pari delicto ;* at any rate, that White was not the least guilty of the two, in the purpose in view ; in fact, that they both participated in the making of the contract, and that they were equally guilty of the unlawful design charged, and of entering into the unlawful arrangement for the purpose of promoting the immoral and unlawful end in view. Upon this ground, the judge, in the court below, ruled that the immorality and illegality of the consideration could not be shown, by the plaintiff, to defeat the deed and enable the plaintiff to dispossess the defendant.

The question is, whether that ruling was correct.

The plaintiff stands upon the right and title of his ancestor, as it existed at his death, and can recover only in case his ancestor could. If his ancestor had no title which he could enforce, then none descended, to the heir. *Oliver White, if living, could not, we conceive, recover the possession of the lands as against the defendant.* The defendant showed a deed from Oliver White, admitted once to have been the owner of the land, duly executed, and himself in possession under the deed. The object of the action is to recover back the possession of the land ; and this, too, upon showing that Oliver White and the defendant, are equally guilty of combining for the promotion of the immorality and crime of the unlawful cohabitation of

said Oliver and Hannah. Mere want of consideration where a consideration is expressed in the deed, is not enough to defeat a deed as between the parties, and cannot be shown for that purpose. *Morse v. Shattuck*, 4 N. H. Rep., 229. In fact, nothing but the immorality and illigality of the consideration, is made the ground for defeating the defendant's deed, and of recovery. And we think the case is precisely analogous, in principle, to that of the payment of money upon an immoral or illegal consideration, in relation to which nearly the whole current of authorities, both English and American, hold that when the parties are found to be *in pari delicto*, the money so paid cannot be recovered back. In such case the clear and well settled doctrine is that *potior est conditio possidentis.*

In *Howson v. Hancock*, 8 D. & E., 575, Lord KENYON said, " *There is no case to be found where, when money* " *has been actually paid by one of the two parties, upon* " *an illegal contract, both being particeps criminis, an* " *action has been maintained to recover it back again.*" " And in *Vandyck & al. v. Hewett*, 1 East 98, it is said, " that " the rule has been settled, at all times, that when " both parties are *in pari delicto, potior est conditio possi-* " *dentis.*"

The language of Lord MANSFIELD, in *Smith v. Bromley*, Doug., 696, note, is this : " If the act is of itself " immoral, or a violation of the general laws of public " policy, then the party paying, shall not recover his " action ; for when both parties are equally criminal " against general laws, the rule is *potior est conditio de-* " *fendentis.*"

In *Lowry v. Bourdieu*, Doug., 467, the same distinguished judge said, " he desired it might be under- " stood that the Court held that, *in all cases where* " *money has been paid on an illegal consideration, it can-* " *not be recovered back, except in cases of oppression,* " *where the parties are not in pari delicto.*"

Mr. Comyns, in his treatise on Contracts, lays down the doctrine that " when money has been paid, upon an illegal contract, it is a general rule, that *if the contract*

be executed, and both the parties are in pari delicto, neither of them can recover from the other, the money so paid." 2 Com. on Contracts, 109. See also, *Browning v. Norris*, Cowp. Rep. 790; *Steers v. Lashley*, 6 D. & L., 61; *Brown v. Twiner*, 7 do., 630; *Clark v. Shee & al.*, Cowp. 197; *McCullum v. Gonslay*, 8 Johns. Rep., 113; *Inhabitants of Worcester v. Eaton*, 11 Mass. Rep. 368.

WILDE, J., in *White v. Franklin Bank*, 22 Pick. Rep., 181, remarks upon the rule of law in question thus: "They (the defendant's counsel,) insist that when "money has been paid, by one of two parties to the "other, on an illegal contract, both being *particeps* "*criminis*, no action can be maintained to recover it "back. This rule may be correctly stated, in respect "to contracts involving moral turpitude, but where the "contract is merely *malum prohibitum*, the rule must "be taken with some qualifications and exceptions." The exceptions and distinctions suggested and approved by him, are those found in 2 Comyn on Contracts, 109.

Babcock v. Thompson, 3 Pick. Rep., 446, was an action of assumpsit, for money had and received, to recover back money lost on gaming. Chief Justice PARKER delivered the judgment of the Court, "We "have no doubt," said he, "that according to the gen- "eral policy and laws of this commonwealth, all gam- "ing is unlawful; and the plaintiff cannot maintain his "action where he is obliged to show his illegal act, as "the foundation for a recovery. This was pretty fully "considered and settled in *Worcester v. Eaton*, and "we see no reason to change the opinion there ex- "pressed."

In *Burt v. Place*, 6 Cowen's Rep., 431, the case was that the plaintiff conveyed to the defendant a small parcel of land for the consideration of $300 as specified in the deed, in money, but in fact the defendant paid for it ten dollars in cash, and agree to pay $240 in specific articles, and was to retain the remainder of the price for assisting the plaintiff in defending a lawsuit,

then pending before a justice. The defendant sold the land for $250, and the action was brought to recover the value of the land, or the money received upon the sale of it, by the defendant. The plaintiff assisted in defending the suit, but was not a licensed attorney. The objection to the plaintiff's right of recovery was founded on the illegality of the agreement between the parties, a part of the consideration being for maintenance. SAVAGE, C. J., delivered the judgment of the Court. "Maintenance," said he, "being prohibited by "statute, and a part of the consideration being there- "fore illegal, this was sufficient to vitiate the contract. "*The main question then is, can money paid or re-* "*ceived upon an illegal contract, be recovered back? The* "*general rule of law is that it cannot where it is paid* "*upon an illegal consideration, and both parties are* "*equally criminal.*" "The contract was both *malum* "*in se*, and prohibited by statute; and although it is "against conscience for the defendant to keep the "plaintiff's money, the court will not lend its aid to "enable the latter to recover back money thus illegally "paid."

In *Denton v. English*, 2 Nott & McCord, 581, it was decided that an executed contract, founded on an immoral consideration, is binding on the parties at common law.

The language of the court in *Roby v. West*, 6 N. H. Rep., 285, is thus: "The parties stand then, *in pari* "*delicto*, and in such case the illegality of the contract "renders it void. The principle, that no court shall "aid men who found their cause of action upon illegal "acts, is not only a well settled, but a most salutary "principle. It is fit and proper, that those who make "claims which rest upon violations of the law, should "have no right to be assisted by a court of justice."

According to the authorities, then, it would seem to be well settled that in reference to all acts or contracts, which are unlawful on account of their immorality, or their tendency to promote it, or because they are hostile to the

public policy, the parties thereunto, are regarded as being in pari delicto. And in all such cases the rule of law is potior est conditio defendentis.

And so upon the authorities cited, it would seem also to be quite clear, that if this were an action to recover back money paid by one of two parties upon a contract, of the immoral and illegal character of the one under consideration, the action could not be maintained upon the principles already stated.

In the case of money thus paid, it passes into the possession of the party, upon a consideration or agreement, or transaction, unlawful for immorality, or as being against public policy, for which cause the law will not lend its aid to recover it back. The title to the money passes well enough, as against the party guilty of participating in the crime of immorality, made the ground of recovery, or any other party claiming simply by virtue of his title. In other language the party thus guilty, thus particeps criminis, thus in pari delicto, will not be listened to, when he alleges and offers evidence of his own criminalty, or immorality and turpitude, as a ground upon which to establish a claim of right against another, in a court of justice.

Courts of justice will not take cognizance of the claims of such parties, based upon such grounds, but will leave them to be settled by themselves. Such parties are regarded, in reference to transactions of the character under controversy, as not being within the protection of the law, and as not being entitled to redress by the aid of the Courts of justice like other parties, but are left to suffer the consequences of any pecuniary loss or suffering, brought upon themselves by such illegal and immoral acts without any legal redress, as a punishment for their wrongs, and to deter others from lending themselves to the commission of similar vices; 11 Mass. Rep., 378.

Nor can it make any possible difference, whether it be the possession of land or of money, that may be sought through the aid of the court. The title and claim to each in the case supposed, must necessarily stand upon the same footing. The aid of the court would as soon be lent to a party for the one as for the other purpose. In the case supposed, of money paid, the possessor has required title and possession, upon an illegal or immoral consideration, and but for the fact that the claimant has participated equally in the wrong, he might well recover it of the possessor; but for that reason, simply, the court will not, as we have seen, aid to assist him to re-possess himself of his money.

So in the relation to the possession of land; the law will not aid a demandant, under like circumstances, in the attempt to re-possess himself of it, in a case in which he has, as far as he may, parted with his title and possession to the tenant.

We see no principle upon which to hold, that any sound distinction exists, between the cases of money and land, in respect to the claims of parties to the aid of the Court, for the redress of wrongs, in the case supposed. It would be equally against sound policy to aid a party seeking redress, guilty of illegality or immorality in the one case as in the other.

The case of *Inhabitants of Worcester v. Eaton*, 11 Mass. Rep., 368, is a decision directly in point sustaining the opinion expressed in this case. We have examined the reasoning of that case and see no ground to question its soundness. It is there said that "there "must be a distinction between a conveyance of land "and money paid on such a consideration, (which was "the composition of a felony), or Betsy Flagg, (the "grantor), could not, on this ground, avoid her deed to "Fiske and Hudson, by entry or action, so as to con-"vey any title to the demandant. Such a distinction

"was attempted in the argument, but we find no "foundation for it. A deed of bargain and sale, signed, "sealed and delivered, acknowledged and recorded is an "actual transfer of the land to the grantee, as much as "the delivering over of a sum of money, or of a per- "sonal chattel is a transfer of either of those."

It was said, at the argument, that the doctrine of that case is in conflict with the English cases. No cases have been cited, however, which we regard as being inconsistent with it, nor have we been able to discover any.

On the whole, we are satisfied that the ruling of the Court rejecting the evidence offered by the plaintiff, was correct.

Judgment on the Verdict.

[58 N. H. 248.]

1878.

Thompson v. Williams.

Whether a sale of goods on Sunday is to the disturbance of others, the facts not being in dispute, is a conclusion of law.

The vender of goods sold on Sunday cannot recover for their price, when the sale was not a work of necessity or mercy.

The vendee of goods sold on Sunday, in violation of Gen. St., c. 255, s. 3, who has asserted and maintained his title to the goods in an action against the vendor for taking the same from his possession, is not estopped to set up the defense of sabbatical illegality in an action by the vendor to recover for their price.

Assumpsit, for $75, the price of two cows sold by the plaintiff to the defendant on Sunday. Fifteen days after the sale, the plaintiff took the cows from the defendant, claiming that the title was not to pass until the price was paid. For that taking the defendant brought an action of trespass against the plaintiff, and recovered a judgment (the damages being assessed at $75), on the ground (as the record shows) that the cows were the property of the defendant by virtue of the sale on Sunday, and the sale was absolute. That judgment the plaintiff has satisfied.

At the trial of this case the plaintiff was the sole witness. On cross-examination, he testified that on the Sunday of the sale he was in his saw-mill making repairs, when the defendant came in; that no one else was then present; that the defendant wanted to buy the cows, and they talked about a sale of them; that the defendant went down and saw them, and came back to the mill: that one Wiggin came in; that the defendant said he had been down to see the cows, and had made up his mind to give $75 for them; that

the plaintiff said he could not sell them for that, but finally concluded to accept the offer, and the bargain was made and the defendant drove them home ; and that at each interview, they talked a considerable time about the bargain.

The sale was not a work of necessity or mercy. The defendant moved for a nonsuit on the ground that the sale was prohibited by the Sunday Law. Gen. St., c. 255, s. 2. The court denied the motion, and the defendant excepted. There was nothing for the jury, unless the question whether the sale was "to the disturbance of others" was a question of fact. *The plaintiff claimed that the Sunday law is not a defense in this case, and that the defendant, having asserted and maintained his title under the Sunday sale in the former suit, is estopped, in this action, to set up the defense of sabbatical illegality.* Verdict for the plaintiff.

SMITH. J. It is a matter of law, that, whether any one besides the plaintiff and the defendant was present or not, the sale was business of the plaintiff's secular calling done "to the disturbances of others," within the meaning of Gen. St.; c. 255, s. 3. *Varney v. French*, 19 N. H. 233 ; *Smith v. Foster*, 41 N. H. 215 ; *Bank v. Thompson*, 42 N. H. 369 ; *George v. George*, 47 N. H. 35.

The defendant is not estopped by the judgment in the trespass suit from setting up the Sunday law as a defense. The maxim, in pari delicto, &c., was not established for the benefit of one party or of the other. The law does not leave the weaker at the mercy of the stronger, nor give the vendor a remedy by allowing him to retake the propery illegally sold. It leaves the parties where their illegal contract left them: when executed, it will not assist the party who has parted with his money or property to recover it back ; when executory, it will not compel performance. It would not leave

the parties where their illegal contract left them if it did not maintain the title acquired by the contract. Williams was in possession of the cows, as of his own property, by the assent of Thompson. When the latter retook them, Williams was enabled to maintain trespass because Thompson could not be heard to controvert his title. *Smith v. Bean*, 15 N. H., 579; *Coburn v. Odell*, 30 N. H. 540, 542. The verdict must be set aside.

Nonsuit.

[38 N. J. Eq. 604.]

1884.

Mary Ann W. Ellicott, appellant, v. John M. Chamberlin, et al., executors of Amplius B. Chamberlin, deceased, respondents.

1. An agreement for a consideration to renounce an executorship, is illegal, because against public policy.
2. Trustees cannot use their relations with trust property to their personal advantage.
3. The law will not aid either party to an illegal contract, but will leave the parties where it finds them.
4. If the contract be executory it will not be enforced, and if already executed the price paid will not be restored.

On appeal from a decree of the chancellor, whose opinion is reported in *Ellicott v. Chamberlin, 10 Stew. Eq. 470.*

Mr. E. P. Conkling and Mr. J. G. Shipman, for appellant.

Mr. O. P. Chamberlin and Mr. J. N. Voorhees, for respondents.

The opinion of the Court was delivered by PARKER, J.

Elisha Warford executed his will on the 1st day of November, 1862. By the residuary clause he gave to the appellant (who was his only child) all the residue of his estate, both real and personal, to her sole and separate use, to keep the lands devised to her, or have them sold by the executors named in his will, as she saw fit. The persons named therein as executors were George A. Allen and Amplius B. Chamberlin.

On the 4th day of February, 1868, Mr. Warford executed a codicil to his will, by which he appointed Holcombe Warford as executor in place of Mr. Allen. The codicil differed from the will chiefly in its residuary clause, which *directed* the executors to sell all the residue of the personal and real estate and convert it

into money, to be invested by them in city and railroad stocks for the benefit of Mrs. Ellicott during her life. Under this clause they could sell and invest without reference to her wishes.

The testator died in May, 1872, and at the time of his death he was over eighty-seven years of age.

Amplius B. Chamberlin, one of the persons named as executors, was a personal friend of the testator, with whom he had been on very intimate terms for many years, and in whom he reposed much confidence. The will and codicil were executed at his residence, and remained in his possession continuously from the time they were executed until he produced them for probate.

When Mrs. Ellicott was informed of the contents of the codicil she was dissatisfied, because of the absolute power given to the executors by its residuary clause. She filed a *caveat* against the probate of both the will and codicil, and proceedings were instituted before the orphans' court to test their validity.

During the pendency of those proceedings, Mrs. Ellicott was informed that Mr. Chamberlain had said he expected to realize a large profit through the power of sale and investment given him by the codicil. When Mr. Nixon, on behalf of Mrs. Ellicott, served a notice on him, he said he would let her settle the estate if she would give him $25,000. He also told Mr. Nixon that he could make that much money out of it. He told Mr. Tunison he could make $15,000 or $20,000 in settling the estate. When Mr. Tunison asked him how, he replied that he would sell off certain farms, get the money for them, and put it in railroad and city bonds, that there would be a large premium on them, and he would have the premium. These boasting declarations of contemplated improper administration of the estate on the part of Mr. Chamberlin for the purpose of making profit for himself out of his trust, came to the ears of Mrs. Ellicott. He did not hesitate to make the same declarations substantially to Mrs. Ellicott herself. Her son Benjamin says that on

more than one occasion he heard Mr. Chamberlin say to his mother, when asked whether he had any interest in the estate more than his lawful fees and commissions, that he could make $20,000 in settling the estate, selling the different pieces of property, and investing the money as directed in the codicil, and that he would do it. Influenced by these and other similar expressions of Mr. Chamberlin, which came to her knowledge, Mrs. Ellicott became anxious to have him renounce his executorship, and negotiations were opened with that end in view. After numerous interviews between the parties on the subject, it was agreed that Mr. Chamberlin would renounce upon payment to him of the sum of $10,000, together with costs and counsel fees. On the 28th of March, 1874, he signed a formal renunciation. The other executor also renounced, but without any compensation, or promised remuneration therefor. The *caveat* was withdrawn, and Mrs. Ellicott, who has acted as administratrix *pendente lite* since the filing of the *caveat*, was appointed administratrix *cum testamento annexo*.

Mrs. Ellicott, in fulfillment of the agreement, paid Mr. Chamberlin, for counsel and costs, over $1,000. She also paid him at one time, in cash, $200, and at another time $150, on the agreement. In March, 1874, she paid him $4,611.88, and he gave her a receipt, in which he acknowledged the payment of that sum, "on account of my renunciation as executor of the last will and testament of Elisha Warford, deceased." As part of the payment last mentioned, Mrs. Ellicott assigned to Mr. Chamberlin a bond and mortgage given to her by Peter A. Yawger for the payment of $1,300. The payments hereinbefore mentioned made up the sum of $5,000, and for the remaining $5,000, she gave him a promissory note dated March 28th, 1874, payable on or before the 1st day of April, 1875, with interest from the 1st day of April, 1874. On the 2d of January, 1875, there was paid on this note the sum of $2,500, and also one year's interest. No other payments have been made on the note, or on the agreement from which the note originated.

Amplius B. Chamberlin died in the spring of 1879. His executors (the respondents), soon after his death, commenced an action in the circuit court of the county of Hunterdon to recover the balance of said note, whereupon Mrs. Elliott filed a bill in the court of chancery to restrain the suit on the note. The bill also prays for a decree compelling the executors of Amplius B. Chamberlin not only to surrender to her the said note, but to repay her the money she has paid on the same, and also the money she has paid on the contract for renunciation of the executorship, and to re-assign to her the Yaeger bond and mortgage.

The chancellor dismissed the bill, and from his decree Mrs. Ellicott appeals.

There is no doubt that the agreement of Mr. Chamberlin to renounce for a consideration was illegal, not because of fraud or duress, as was urged before the chancellor, but because it is against public policy. It is a general principle, universally enforced, that trustees cannot use their relations with trust property to their personal advantage. An agreement to accept money or other valuable thing as consideration for violating or abandoning a trust, is illegal. A person named in a will as executor is not obliged to accept. He may voluntarily renounce for reasons that do not involve mercenary motives, but he has no right to make merchandise of the confidence reposed in him by a testator.

In the case of *Porter v. Jones*, reported in *52 Mo. 399*, it was held that a promissory note, whereof the consideration was an agreement to resign as administrator, with the view of having another appointed, was void as against public policy. The court said, in that case, that the agreement amounted to trafficking with an important trust; and although an administrator was not a public officer, yet he held a private trust as sacred.

In *Staunton v. Parker, 19 Hun, 55*, it was decided that an agreement to renounce an executorship for a consideration was void. The matter came before the court on appeal from an order of a surrogate, holding,

the renunciation invalid. The court, in its decision, adopted the language of the surrogate, who said "that an executor had the undoubted right to re- "nounce, of his own motion, but a renunciation for a "consideration, a renunciation purchased in any "manner, is another matter. If agreements of "this nature are to be enforced, then testators "may well doubt, not only as to who will carry "out their wills, but whether they will be carried "out at all. The door might then be opened to fraud "and corruption on the part of designing men and in- "triguing descendants, and to imposition on confiding "testators."

A trust is regarded as a matter of honor and conscience, and not to be undertaken with mercenary views. *Manning vs. Manning, 1 Johns. Ch. 527.*

In the case last cited, the chancellor, in discussing the question of commissions and compensation to trustees in general, observed "that if the rule applied "with more force and propriety to one kind of trust "than another, it was that of an executor who gives no "security and who is selected by reason of some special "and sacred confidence, resulting from ties of kindred "or friendship, and charged by the testator in his "dying moments with interests of the greatest human "concern, and which the testator is on the eve of re- "nouncing forever. The request of a testator in such "case in the supplication of a friend."

I cannot conceive of anything more likely to undermine confidence and more directly opposed to public policy than to allow the partiality and friendship of testators, manifested in choosing those whom they wish to settle their worldly estates, to be made the subject of merchandise. There could not be a more marked violation of trust than such traffic.

On the part of the respondents it is urged that the whole sum of $10,000 was not paid to procure Mr. Chamberlin's renunciation of the executorship, but that the money was to be paid in part for services he had rendered the deceased, for advice and assistance

to be given Mrs. Ellicott in settling the estate as administratrix with the will annexed, and for going on her bond as one of the sureties. The evidence does not sustain this view, but shows that the money was to be paid wholly for the renunciation. But even if services performed or to be performed on the part of Mr. Chamberlin had entered into the contract, it was void. A contract is void if only a *portion* of the consideration is illegal as against public policy. It has been held that a contract based wholly or *partly* on an agreement of a trustee of a corporation to resign his trust for a consideration, is illegal. He may resign when he chooses, but he must not make any profit to himself by his resignation. *Forbes v. McDonald*, 54 *Cal. 98.*

It was the duty of Mr. Chamberlin either to renounce voluntarily, without consideration, or to endeavor to prove the will and codicil; and, after the *caveat* was withdrawn, to assert his rights as executor and proceed with the settlement of the estate entrusted to him by the testator. Instead of doing this, proceedings to probate the will and codicil were delayed, and he entered upon the effort to sell his trust. The price demanded at first was enormous, and the price obtained at the close of the barter was exorbitant. He could not possibly have been allowed one-third of the amount he received, in commissions, if he had settled the estate. He performed no service and incurred no risk. It is not the amount of the profit that determines the illegality, for a trustee is not allowed to make any profit out of his trust. The old English rule was to deny even commissions, on the theory that a trusteeship was a matter of honor, not to be compensated by money,

In New Jersey, commissions are given by statute, which, while it fixes rates beyond which they will not be allowed, also provides for their forfeiture by misconduct, or by neglect to state and settle accounts within the time limited, so that it cannot be said that an executor is entitled to any compensation until his

duties have been fully performed, and allowance has been made by order of the court.

There is no doubt that Mrs. Ellicott could have successfully resisted payment of any part of the money she agreed to give Mr. Chamberlin for the renunciation of his executorship, had she interposed defence. But she chose voluntarily to pay the greater part of the money, and she cannot now recover what she has paid. She was a participant in an illegal contract for the purpose (as the evidence shows) of obtaining for herself the administration of the estate.

If a contract be illegal as against public policy, its invalidity will be a defence while it remains unexecuted. If the illegal contract be in part performed and money has been paid in pursuance of it, no action will lie to recover the money back. *Smith on Contracts 259.*

The law will not assist either party to an illegal contract, and the parties being in pari delicto, it will leave them where it finds them. If the contract be still executory, it will not enforce it, and if already executed it will not restore the price paid nor the property delivered. *Setter v. Alvey, 15 Kan. 157.*

Mrs. Ellicott cannot, therefore, compel the repayment of the money she gave Mr. Chamberlain on the agreement or on the note, nor can she compel the assignment to her of the Yawger bond and mortgage, as prayed for in her bill. To that extent the contract has been executed, but she can resist the payment of the balance of the note, for which suit has been brought. Her defense to the note, can, however, be made in a court of law, and therefore the suit in the circuit court, already commenced, should not be enjoined.

The bill was properly dismissed by the chancellor, without costs. The appellant will not pay costs in this court. The decree is affirmed.

Decree unanimously affirmed.

[53 N. J. Eq. 259.]

1895.

James Brindley, administrator, v. Fanny Lawton.

A bill which rests on the allegation that the complainant's intestate gave a certificate of stock to the defendant in consideration for her living thereafter in illicit relations with him, and which prays for a surrender of such certificate, will be stricken out on motion, because it shows that the contract was illegal and immoral.

On motion to strike out, for scandal and impertinence.

Mr. Woodbury D. Holt, for the motion.

Mr. Edwin Robert Walker and Mr. Garrett D. W. Vroom, *contra*.

BIRD, V. C.

The complainant shows that he is the administrator John Brindley, deceased; that the decedent left a widow and three children him surviving; that at the time of his death he actually lived and cohabited with the defendant, Fanny Lawton; that the decedent was, at the time of his death, entitled to the possession and was the owner of a certificate of stock of a certain pottery, which certificate represented twenty shares of the stock of said company of the par value of $100 per share; that said certificate was afterwards ascertained to be in the possession of the defendant, Fanny Lawton, and that when the possession thereof was demanded of her by the complainant she refused to surrender the same, and claimed that it had been given to her by the said John Brindley, deceased, in his lifetime. The bill then charges

"That even if the pretense so last as aforesaid made of the said Fanny Lawton be true, that nevertheless the said gift of stock by your orator's said father to the said Fanny Lawton is absolutely null and void as being against public policy and good morals, because

your orator's said father gave the said stock, if at all, to the said Fanny Lawton as an inducement to, and consideration for, her living with him thereafter in a state of adultery, and that the said Fanny Lawton, in consideration thereof, thereafter did live with your orator's said father in open adultery, and was so living with him at the time of his death."

The motion is to strike this out because it is impertinent and scandalous. Since this is the foundation of the complaint, the whole structure must stand or fall with it. The allegation is that the certificate was given to her upon consideration of her submission to him in committing the crime of adultery. The gift is alleged to have been made *before* the offense against the law and good morals was committed.

Can a court of equity grant relief in such case by compelling the donee to surrender the possession of the thing given as compensation for her part in the offence? Professor Pomeroy, in speaking of contracts that are void or voidable, because of their illegal or immoral character, says:

"Among the most important and familiar illustrations are the following: Contracts based upon the consideration, either past or future, or illicit sexual intercourse, or stipulating for such future intercourse, or in any manner promoting or furnishing opportunities for unlawful cohabitation or prostitution." *2 Pom. Spec. Perf. § 936; 1 Story Eq. Jur. § 296.*

That the contract presented by the bill was illegal and immoral is so declared in the bill itself. Will the court aid either party in asking for a rescission? The answer to this was in the negative in the case of *Ellicott v. Chamberlin, 11 Stew. Eq. 604.* In that case, in order to induce the resignation of an executor, he was offered $10,000. After the payment of $5,000 in cash and the assignment of a bond and mortgage for $1,300, a promissory note was given for the remaining $5,000. After the payment of $2,500 on this note, an action at law was begun for the recovery of the amount due thereon. A bill was then filed in this court presenting the whole transaction and asking that the action at

law be enjoined. The bill was dismissed by the chancellor. An appeal was taken. In delivering the opinion of the court of errors, Mr. Justice PARKER used the following language:

"There is no doubt that Mrs. Ellicott could have "successfully resisted payment of any part of the "money she agreed to give Mr. Chamberlain for the "renunciation of his executorship, had she interposed "defence, but she chose voluntarily to pay the greater "part of the money, and she cannot now recover what "she has paid. She was a participant in an illegal "contract for the purpose (as the evidence shows) of "obtaining for herself the administration of the estate.

"If a contract be illegal as against public policy, its "invalidity will be a defence while it remains unexe-"cuted. *If the illegal contract be in part performed "and money has been paid in pursuance of it, no action "will lie to recover the money back. Sm. Cont. 259.*

"The law will not assist either party to an illegal "contract, and the parties being *in pari delicto*, it will "leave them where it finds them. *If the contract be "still executory it will not enforce it, and if already "executed it will not restore the price paid nor the "property delivered. Setter v. Alvey, 15 Kan. 157.*

"Mrs. Ellicott cannot, therefore, compel the repay-"ment of the money she gave Mr. Chamberlain on the "agreement or on the note, nor can she compel the as-"signment to her of the Yawger bond and mortgage as "prayed for in her bill. To that extent the contract "has been executed, but she can resist the payment of "the balance of the note for which suit has been "brought. Her defence to the note can, however, be "made in a court of law, and therefore the suit in the "circuit court, already commenced, should not be "enjoined."

"The bill was properly enjoined by the chancellor, without costs. *Johns v. Norris, 12 C. E. Gr. 485; Slocum v. Wooley, 16 Stew Eq. 451.*

With these cases before me, it is needless that I should go further.

The motion to strike out must prevail, with costs.

[29 Vroom (58 N. J. Law), 627.]

1896.

James W. Hope, Plaintiff in Error v. The Linden Park Blood Horse Association, Defendant in Error.

1. An agreement which controls or restricts, or tends or is calculated to control or restrict, the free exercise of a discretion for public good, vested in one acting in a public official capacity, is illegal and so reprobated by the courts that no redress will be given to a party who sues for himself in respect of it.

2. In an action in which either party to such an agreement seeks redress from the other for his own benefit, he will be left by the courts in the position in which he places himself.

3. If a party to such an agreement, by proof of part of the facts constituting the transaction out of which it grew, makes a *prima facie* case for recovery against another party to the agreement, without disclosing the illegality, the defendant's guilty participation in the transaction will not preclude him from showing that illegality.

On error to the Union County Circuit Court

For the plaintiff in error, Foster M. Voorhees and Frank Bergen.

For the defendant in error, Allen L. McDermott.

The opinion of the court was delivered by

THE CHANCELLOR: The judgment reviewed is in an action upon contract brought by the Linden Park Blood Horse Association to recover from James W. Hope the sum of $5,000 paid by it to him in August, 1893, as hereinafter stated, in which the defendant pleaded the general issue.

The case was tried before the judge at Circuit without a jury.

Errors are assigned upon refusals of the judge to nonsuit and to admit and consider the defence that the money sued for was paid to Mr. Hope in pursuance of a corrupt and illegal agreement.

The plaintiffs below proved that it applied to the township committee of the township of Linden, in Union County, to license it to maintain and use a race-course in that township, under chapter 16 of the laws of 1893 (Pamph. L., p. 28), entitled "An act concerning the maintaining of race-courses in this state, and to provide for the licensing and regulating of the same;" that thereafter it was resolved by the township committee, Mr. Hope being a member thereof and voting in favor of the resolution, that the defendant in error be licensed as it requested, for a period of five years, upon conditions stated, and that it pay to the inhabitants of the township of Linden, for the exercise of the privileges granted by the license, the sum of $5,000 annually during the second, third, fourth and fifth years of that term, and that during the first year, it pay $5,000 to aid in the construction of a sewer projected in the township; the sewer referred to was to be the work of a private corporation called the Roselle Sewerage Company; that upon the adoption of the resolution an agent of the defendant in error, who was present at the meeting, prepared his check for $5,000, payable to his own order, and endorsed it to Mr. Hope, to whom it was also delivered; and that in March, 1894, the $5,000 was yet in Mr. Hope's hands, and was demanded of him by the defendant in error.

Upon this proof, the court refused to nonsuit, and then the defendant below proceeded, under objection, the decision of which was reserved, to prove that after the resolutions of license were adopted, in the midst of confusion, some one remarked that there was something yet to be done, and that the reply was that $5,000 was to be paid, and that thereupon the agent of the defendant in error produced a blank check, and discussion arose as to whom it should be drawn; that the treasurer of the township was named and the treasurer of the sewer company was also mentioned, and that it was finally arranged that the check should be given to Mr. Hope, and be left with him to see that it

got to the proper parties; also that it was suggested, by the agent of the defendant in error, that in making the check payable to Hope, the word "manager" should be added after Hope's name, but upon objection that word was omitted from the check; and also that Mr. Hope was the manager of the Roseell Sewerage Company and a subscriber for its capital stock; and that the corporation was organized to conduct its business for the profit and advantage of its stockholders.

In deciding the case, the judge held that the evidence upon the part of the plaintiff did not show either that there was any illegality in the transaction, or that the transaction was tainted with criminality or in contravention of public policy; that the payment appeared to be a voluntary payment to the defendant, who, therefore, stood as the agent of the defendant in error, charged with the duty of expending the money under its direction, from whom the money might, in legal right, be withdrawn at any time. Hence, he concluded that, at the close of the case of the plaintiff below, a right to recover had been proven.

As to the proofs by the defendant below, Hope, the judge said: "The defence is substantially this: 'That "a stockholder in a private corporation gave his vote "as a public officer in discharge of a public duty in "consideration that the plaintiff would pay "$5,000 into the treasury of the private "sewer company which the defendant was engaged "in promoting. This is a corrupt agreement, which is "as clearly denounced by the law as though the money "had been paid to the defendant for his exclusive "benefit, and it cannot be set up in defence to this ac-"tion. If the plaintiff, in order to make out his case, "had been compelled to show these facts, the law "would not have permitted him to recover back the "money paid for such a corrupt purpose. The defend-"ant is no more favored by the law. He cannot in-"troduce such a state of facts into the case on his own "behalf and set up his own corrupt action as a legal

" defence to this suit. The defense set up by this " testimony is incompetent and inadmissible, and is " overruled."

The court then proceeded to give judgment for the recovery of the $5,000, with interests and costs.

The proposition laid down by the trial judge that the transaction which influenced or induced Hope to give his official vote for the license of the defendant in error, was corrupt and unlawful, is not disputed. It is too well established to admit of question that an agreement which controls or restricts, or tends or is calculated to control or restrict, the free exercise of a discretion for the public good, vested in one acting in a public official capacity, is illegal, and so reprobated by the courts that no redress will be given to a party who sues for himself in respect of it.

The question now mooted is whether the courts will permit a party to such an agreement to show its corrupt and illegal character in defense of an action against him to recover money paid to him in pursuance of its terms.

The trial judge thought that if one party to such an agreement should make out a *prima facie* case for the recovery back of money paid under it, without exhibiting the illegalty, it would not be competent for the person sued, who had been party to the agreement, to show the illegality and defeat such recovery.

The rule is that in an action in which either party to such a contract seeks redress from the other, for his own benefit, he will be left by the courts in the position in which he has placed himself. *Church v. Muir*, 4 Vroom, 320; *Price v. Polluck*, 8 *Id.* 44; *Shallcross v. Deats*, 14 *Id.* 177, 182.

That rule is the application of the maxim *ex turpi causa non oritur actio.* The maxim has its foundation in the public policy of discouraging illegal and corrupt agreements, by holding them to be void, and refusing all judicial aid between the parties to them.

In *Den v. Shotwell*, 3 Zab. 465, 474, Chief Justice GREEN used this language: " But in dealing with illegal " contracts, courts do not and cannot look to the in-

" terest of those who are parties to the illegal transac-
" tion. The law regards the welfare of society as para-
" mount, and, in enforcing the law, courts cannot
" impair its efficiency or cripple its operation by con-
" siderations affecting the interest of those who are
" *particeps criminis.*"

In *Holman v. Johnson*, 1 Cowp. 343 Lord MANSFIELD said: " The objection that a contract is immoral or
" illegal as between the plaintiff or defendant, sounds
" at all times very ill in the mouth of the defendant.
" It is not for his sake, however, that the objection is
" ever allowed, but it is founded in general principles
" of policy, which the defendant has the advantage of,
" contrary to the real justice between him and the
" plaintiff, by accident, if I may say so. The principle
" of public policy is this—*ex dolo malo non oritur actio.*
" No court will lend its aid to a man who founds his
" cause of action upon an immoral or an illegal act.
" If from the plaintiff's own stating, or otherwise, the
" cause of action appears to arise *ex turpi causa*, or a
" transgression of a positive law of this country, there
" the court says he has no right to be assisted. It is
" upon that ground that the court goes, not for the
" sake of the defendant, but because they will not
" lend their aid to such a plaintiff, so if the plaintiff
" and defendant were to change sides, and the
" defendant were to bring his action against the
" plaintiff, the latter would then have the advantage
" of it; for where both are equally in fault, *potior est*
" *conditio defendentis.*"

In *Marlatt v. Warwick*, 4 C. E. Gr., 454, Mr. Justice DEPUE said: " The objection is rather that of the
" public, speaking through the courts, than of the
" defendant as a party to the contract. The law
" disallows all proceedings in respect of illegal
" contracts, not from any consideration of the relative
" position and rights of the parties, but upon grounds
" of public policy."

It appears to me to follow from this view of the foundation of the rule with respect

to illegal and corrupt contracts, that the policy which constrains the courts to deny all relief to the parties, demands that when either of those parties shall offer to show that the cause of action springs from an illegal or corrupt agreement, the courts shall admit and consider the illegal proofs offered to that end. It certainly does not further the salutary effect of the rule, that neither party will be aided by the courts, or satisfy as to its impartiality, to exclude proof of some of the facts essential to show the entire transaction and thus exhibit its illegality, merely because they are offered by a particeps criminis against whom a prima facie case is made by one equally corrupt, who has gained an advantage by presenting to the court garbled and partial proofs, which suppress part of the truth and impose a mutilated state of facts upon the court, in place of the real transaction.

It was said by Chancellor KENT (2 Kent Com. 467) that "the courts of justice will allow the objection "that the consideration of the contract was immoral "or illegal, and be made even by the guilty party to "the contract; for the allowance is not for the sake of "the party who raises the objection, but is grounded "on general principles of policy."

In 2 Stark. Ev. 86, it is said: "Where the illegal "consideration is set forth upon the record, the ob-"jection may be taken either by demurrer or in arrest "of judgment. But where it does not appear on the "record, the defendant may show that the claim is in "reality founded upon an illegal and noxious agree-"ment."

In *Smith v. Applegate*, 3 Zab. 352, which was a suit upon a promissory note, under a plea of the general issue, the defendants were permitted to show the illegality of the transactian of which the giving of the note was a part.

So, in *Nellis v. Clark*, 20 Wend. 24, in a suit upon a note, it was held that the defendant might produce proof of like character. And a similar right in the defendant was recognized in *Harrison v. Hatcher*, 44 Ga. 638; *Inhabitants of Worcester v. Eaton*, 11 Mass. 368, and *Smith v. Hubbs*, 10 Me. 71, 78.

A single word may be added concerning the contention by the defendant in error that Mr. Hope is, under all the evidence offered, to be regarded as its agent, to whom it paid the $5,000 for the purpose of conveying it to those who would build the sewer, from whom it might recall its money at any time prior to his payment thereof over, according to his instruction. We think that the facts do not warrant this position, but that, on the contrary, they clearly show that the payment to Hope was regarded as the final disposition of the money so far as the defendant in error was concerned. Hope was recognized as the manager of the sewer company, and to him, as such, the money was paid in execution of the illegal agreement. It is unnecessary to consider what legal effect the fact contended for, if established, would have.

The judgment will be reversed.

For affirmance—None.

For reversal—The Chancellor, Chief Justice DEPUE, DIXON, GARRISON, GUMMERE, LIPPINCOTT, LUDLOW, MAGIE, BARKALOW, BOGERT, NIXON. 12.

[14 N. Y. 162.]

1856.

Tracy against Talmage, President, &c.,

IN THE MATTER OF THE CLAIM OF THE STATE OF INDIANA *against* LEAVITT, Receiver.

Mere knowledge by the vendor that the purchaser intends to make an illegal use of the property, is not a defence to an action for its price.[2]

But if it is made a part of the contract of sale that the property shall be used for an unlawful purpose, or if the vendor, with knowledge of the intent of the purchaser, do anything beyond making the sale in aid or furtherance of the unlawful design, he cannot recover for the property.[3]

Where an article is purchased with intent to be used in perpetrating a crime, knowledge by the vendor of such intent would be a bar to an action therefor.

Per Comstock, J., in opinion on motion for re-argument.

Where the vendor of stocks to a banking corporation by the contract of sale agreed to, and did receive therefor notes, payable on time, which the corporation was not authorized to make, and from issuing which it was prohibited under a penalty by statute; *Held*, that notwithstanding the contract was illegal and void, the vendor could recover the value of the stocks sold and delivered on an implied undertaking.

Although the vendor was a party to the illegal contract, he was not *in pari delicto* within the rule which forbids the court to grant one party to an illegal contract or transaction relief against the other.

Where the parties to a contract or transaction not *malum in se*, but prohibited by a statute, are not equally guilty, courts may afford relief to the less guilty party.

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[1] See Curtiss v. Leavitt, 15 N. Y., 9.

[2] Sortwell v. Hughes, 1 Curtis, 244; Backman v. Jenks, 55 Barb. 468; Smart v. White, 73 Me. 338; Feineman v. Sachs, 23 Kas. 626; Distillling Co. v. Nutt, 34 Kas. 729.

[3] Birkett v. Chatterton, 13 R. I. 302.

The cases and distinctions on this subject discussed and pointed out by SELDEN and COMSTOCK, Js.

Tracy v. Talmage, 18 Barb., 456, modified.

Distinguished in *Hull v. Ruggles*, 56 N. Y. 428.

The North American Trust and Banking Company was, in July, 1838, organized in the city of New York as a corporation, under and by virtue of the act "To authorize the business of banking." (*Laws of* 1838, 215.) By the articles of association the capital was $2,000,000, with power to increase the same to $50,000,000. The amount of the capital was subscribed, a small portion thereof paid in in cash, and the residue secured by bonds and mortgages and stocks.

In August, 1838, the company purchased $1,000,000 of Arkansas bonds, paying therefor $300,000 in cash, and issuing certificates of deposit for $700,000, the residue of the price payable monthly, during some fifteen months. Of these bonds $200,000 were deposited with the comptroller of the state as security for bank notes issued to the company, and the residue were sent to Europe, and sold on behalf of the company to meet drafts which it had drawn on its correspondents in London. About the 15th of September, 1838, the company commenced receiving deposits and discounting commercial paper. The company never received from the comptroller bank notes to exceed $330,000. In January, 1839, the Trust and Banking Company purchased of the Morris Canal and Banking Company, a corporation created by the laws of the State of New Jersey, but which had an office and did business in the city of New York, bonds, made by the State of Indiana, to the amount of $1,200,000, at par, and gave therefor, to the Morris Canal and Banking Company, its obligations, in the form of negotiable certificates of deposit, payable with interest at a future day. The most of these bonds were sent to the correspondents of the Trust and Banking Company, in London, and there sold at a discount to raise funds to meet the drafts of the company. In the fall of 1839 the Trust and Banking Company agreed to purchase of the Morris Canal

and Banking Company, bonds of the State of Indiana, amounting to $1,000,000 at par, and to pay for the same, at 98 per cent, in negotiable certificates of deposit, made by the Trust and Banking Company, payable at a future day. This agreement was not in writing. On or about the 28th of October, 1839, these bonds were delivered by the Morris Canal and Banking Company to the Trust and Banking Company, and the latter made and delivered to the former certificates of deposit for the amount of the purchase price. The most of these certificates were for $1000 each. They respectively bore date October 28th, 1839, were signed by the president and cashier of the North American Trust and Banking Company, and stated that James Kay had deposited in the bank a sum, which was named, payable to his order, on the return of the certificate, on demand after a future day, which was specified; each certificate was endorsed by Kay in blank. These Indiana bonds were sent to London by the Trust and Banking Company to be sold to raise funds to meet its drafts and obligations payable there; and they were sold there at a large discount soon after the purchase. Kay, the payee named in and who endorsed the certificates, was a clerk for the Morris Canal and Banking Company; he never deposited any money with the Trust and Banking Company, and had no interest in the certificates. On the 11th of December, 1839, a written agreement was made between the Morris Canal and Banking Company and the State of Indiana, which recited that the former was indebted to the latter for Indiana state stocks, theretofore sold and delivered by the latter to the former, and by which the Morris Canal and Banking Company agreed to deliver to the State of Indiana, among other securities, certificates of deposit in the North American Trust and Banking Company to the amount of $196,000. Subsequently, and during the same month, the Canal and Banking Company transferred and delivered to the State of Indiana $196,000 of the certificates issued to it by the Trust and Banking Company under date of Octo-

ber 28, 1839, and payable after January 1st, 1841, and the same were receipted by the State of Indiana on the back of the agreement last above mentioned. On the 2d of January, 1841, the State of Indiana surrendered to the Trust and Banking Company a portion of these certificates, to the amount of $175,000 and received therefor eighteen other certificates of deposit, in the aggregate, for the same amount, dated on that day, signed by the president and cashier of the Trust and Banking Company, and payable to the order of, and endorsed by James Kay. Five of these certificates were for $9000 each, and thirteen of them for $10,000 each. Each stated that James Kay had deposited, with the Trust and Banking Company, a sum, which was specified, and that the company engaged to repay the holder of this certificate this sum upon the surrender thereof at a future day named, with interest, at the rate of seven per cent per annum. Of these eighteen certificates, the one first due was payable five months from date, and one became payable every month thereafter. The purchase of the Indiana bonds were negotiated and consummated in the city of New York, and all the certificates were issued there.

In August, 1841, the plaintiff herein being a stockholder and creditor of the Trust and Banking Company, commenced this suit against it in the court of chancery. The bill was filed under the Revised Statutes (2 *R. S.*, 463, §§ 39–42), and alleged that the company was insolvent, and that it had violated the law, &c, It prayed that the company might be enjoined from transacting business, that a receiver of its effects might be appointed and the corporation dissolved, &c. In September, thereafter, David Leavitt was appointed receiver, with the usual powers; and in June, 1843, a decree was made in the suit by which the Trust and Banking Company was adjudged to be insolvent, and it and its officers were perpetually enjoined, &c. An order was made in October, 1845, that the creditors of the company exhibit their claims to the receiver or be precluded from sharing in the funds,

and providing that any claimant might enter his appearance in the action; and that if any claim were disallowed by the receiver, it should be referred to referees. Pursuant to this order the State of Indiana, in December, 1845, exhibited the claim in controversy to the receiver. In the notice of the claim furnished to the receiver it was stated that the State of Indiana had a debt against the Trust and Banking Company of $175,000 with interest thereon from the 2d of January, 1841, for a balance due at that date for bonds issued by said state and sold and delivered to the Trust and Banking Company by the Morris Canal and Banking Company or otherwise. That this debt was owned by the State of Indiana, and that it should be allowed and paid to it, or that it should be allowed in the name of the Morris Canal and Banking Company for the use and benefit of the State of Indiana, and paid to the latter as the assignee of the demand. Attached to the notice of claim were the eighteen certificates for $175,000, above mentioned, which it was alleged were issued by the Trust and Banking Company for the debt claimed. In March, 1846, the receiver disallowed the claim, and in March, 1847, an order was made referring it to three referees, who, after hearing the proofs, in September 1850 reported against the validity of the claim. The report of the referees contained all the evidence given before them; and stated that they were of opinion, upon the proofs, that the claim was not valid, and that there was nothing due from the Trust and Banking Company or its receiver to the claimant. Other than this the particular conclusions of the referees as to the facts or law did not appear. The evidence proved the facts above stated. It also proved that the Indiana bonds were purchased by the Trust and Banking Company with the intention of selling them to raise money, and that they were so sold, principally in England, at a large discount. There was some evidence tending to prove that the Morris Canal and Banking Company knew at the time of the sale that the Trust and Bank-

ing Company purchased the bonds with this intention. It also appeared that the Trust and Banking Company, both before and after the purchase of the $1,000,000 of bonds in October, 1849, was accustomed to make and issue negotiable certificates of deposit, payable on time; and that during the time it carried on business, it issued negotiable paper, payable at a future day to over $15,000,000. All the certificates issued on account of the Indiana bonds, except those in question, appeared to have been paid. There was evidence tending to prove that in making the sale of the bonds, the Morris Canal and Banking Company was in fact the agent of the State of Indiana. The State of Indiana filed exceptions to the report of the referees, which, in September, 1851, were overruled at a special term of the supreme court held in New York by Justice Edmonds, and the report made by the referees affirmed. An appeal was taken by the State of Indiana, and in 1854, the court, at a general term held in New York, reversed the judgment rendered at special term, and adjudged that the claim was lawful and valid against the Trust and Banking Company, and was justly due and owing to the claimant, with interest from January 2d, 1841, "as the balance remaining unpaid for state bonds sold and delivered to the Trust and Banking Company by the Morris Canal and Banking Company, and by the last-mention company transferred to the claimant." The decree fixed and adjudged the amount of the demand to be $343,437.50, being the amount of the $175,000 and interest from January 2d, 1841; and the receiver was directed to pay the same in the due administration of the assets of the company. From this decree the receiver appealed to to this court.

The cause was argued in this court in 1855, and the court ordered a re-argument. It was again argued at the March term, 1856.

Samuel Beardsley, for the appellant.
A. Mann, for the respondent.

SELDEN, J. To avoid confusion, I shall consider this case in the first instance as though the Morris Canal and Banking Company, instead of the State of Indiana, was the claimant upon the record. The general ground upon which the claim is resisted is, that it arises upon an illegal contract. Three grounds of illegality are alleged: 1. That the purchase of state stocks by the North American Trust and Banking Company for the purpose of resale, upon speculation, was beyond the scope of its corporate powers, and, therefore, illegal, and that the Morris Canal and Banking Company knew that such was the object of the purchase; 2. That the North American Trust and Banking Company had no power to issue negotiable promissory notes upon time; that such notes, therefore, and the contract of sale which provided for receiving them in payment, are illegal and void; 3. That the certificates or post notes delivered in payment for the state stock, being calculated and intended for circulation, were issued in violation of the restraining act; and that the Morris Canal and Banking Company was *particeps criminis*.

In examining the first of these grounds, I shall not notice the position taken by the counsel for the receiver, that a mere excess of authority on the part of a corporation in making a contract, is equivalent in its effect to the violation of a positive penal enactment; because, so far as the alleged illegality consists in the purpose for which the stocks were purchased, the case can, I think, be disposed of upon principles which do not involve that question. That the North American Trust and Banking Company made the purchase with a view to a re-sale, and not to a deposit with the comptroller, seems to be established by the proof; and that such a purchase and re-sale were unauthorized and beyond the scope of the corporate powers of the company, was settled by this court in the case of *Talmage v. Pell* (3 *Seld.*, 328).

It is contended by the counsel for the claimant, that there is no evidence that the vendors, the Morris Canal and Banking Company, had any knowledge of

the object of the vendees in making the purchase. I shall, however, assume that they had such knowledge; because, in the view I take of the subject, it cannot affect the result. The question presented upon this branch of the case is, whether the bare knowledge by a vendor that the purchaser intends to make an unlawful use of the article sold, will prevent a recovery for the purchase money. Although I deem this question clear upon principle, I shall, nevertheless, rest my opinion in regard to it mainly upon the authorities.

A question somewhat analogous arose in the court of king's bench, in England, in the case of *Faikney* v. *Reynous* (4 *Burr.*, 2069). The plaintiff and one of the defendants had been jointly concerned in stock-jobbing; and the plaintiff, in contravention of an express statute, had advanced £3000, in compounding certain differences, for one-half of which the defendants had given the bond upon which the action was brought. Upon demurrer to a plea setting up these facts, the court held the plaintiff entitled to recover. Although that case differs from the one under consideration, in its facts, yet the principle upon which the case was decided, viz., that a party to a contract, innocent in itself, is not responsible for or affected by the use which the other may make of the subject of the contract, is equally applicable here. Lord Mansfield said, in speaking of the act of the defendant in giving the bond: "*This* is not prohibited. He is *not concerned* in the use which the other makes of the money; he may apply it as he thinks proper. But certainly this is a fair, honest transaction *between these two*."

There is a class of English cases which seems to me identical in principle with the present, and concerning which the decisions have been unvarying. I refer to the cases of goods purchased for the express purpose of being smuggled into England, in violation of the revenue laws, and where the object of the purchase was known to the vendor. The first of these cases is that of *Holman* v. *Johnson* (*Cowp.*, 341), where the

plaintiff, residing at Dunkirk, had sold to the defendant a quantity of tea, knowing that the latter intended to smuggle it into England, but had himself no concern in the smuggling. The action was brought for the price of the tea, and it was held, upon these facts, that the plaintiff could recover. The principle of the case is the same as that adopted in *Faikney* v. *Reynous (supra)*, that mere knowledge by the vendor of the unlawful intent did not make him a participator in the guilt of the purchaser. Lord Mansfield, who delivered the opinion in this case also, says: "The seller indeed, *knows* what the buyer is going to do with the goods; but the interests of the vendor is totally at an end, and his contract complete by the delivery of the goods."

Where, however, the seller does an act which is calculated to facilitate the smuggling, such as packing the goods, in a particular manner, he is regarded as *particeps criminis*, and cannot recover; as is shown by the subsequent cases of *Biggs* v. *Lawrence* (3 *Term R.*, 454), *Clugas* v. *Penaluna* (4 *id.*, 466), and *Waymell* v. *Reed* (5 *id.*, 590). These were all cases where the plaintiff had sold the goods to the defendant, *knowing* that they were to be smuggled into England; and in each of them the plaintiff was nonsuited. But they all differed from the case of *Holman* v. *Johnson*, in this, that the plaintiff had in each case done some act, in addition to the sale, in aid and furtherance of the defendant's design to violate the revenue laws, and the decision was in each case placed distinctly upon this ground. The language of Buller, J., in the case of *Waymell* v. *Reed*, is very explicit. He says: "In *Holman* v. *Johnson*, the seller did not assist the buyer in the smuggling. He merely sold the goods in the common and ordinary course of trade. But this case does not rest merely on the circumstance of the plaintiff's *knowledge* of the use intended to be made of the goods; for he actually *assisted* the defendants in the act of smuggling, by packing the goods up in a manner most convenient for that purpose."

In each of the three cases last cited, special care is taken to guard against any inference that it was intended to impair the force of the decision in *Holman* v. *Johnson*. Indeed, that decision seems to have been uniformly followed by the courts of England from that day to the present. In 1835, the question again arose in the case of *Pellecat* v. *Angell* (2 *Crompt. Mees. & Ros.*, 311), and the court held that the plaintiff could recover the price of goods sold to the defendant, although he knew at the time of the sale that they were bought to be smuggled into England. Lord Abinger says: "The distinction is, where he takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels, or otherwise, there he must take the consequences of his own act." Again he says: "The plaintiff sold the goods; the defendant might smuggle them if he liked, or he might change his mind the next day; it does not at all import a contract, of which the smuggling was an esssential part." It is true, the Chief Baron in one part of his opinion seems to lay some stress upon the fact that the plaintiff was a foreigner; but it is clear that this can have nothing to do with the principle upon which those cases rest, which is, that the act of selling is not in itself a violation of the law; and the mere fact of knowledge of the unlawful intent of the vendee does not make the vendor a participator in the guilt. The language of the associates of the Chief Baron goes to show that the domicil of the plaintiff had no influence upon the decision. Bolland, B., says: "I think the distinction pointed out by the Lord Chief Baron, between merely knowing of the illegal purpose, and being a party to it by some act, is the true one." Alderson, B., says: "If the plea disclosed circumstances from which it followed, that permitting the plaintiff to recover would be permitting him to receive the fruits of an illegal act, the argument for the defendant would be right; but that ground fails, because the mere sale to a party, although he may intend to commit an illegal act, is no breach of law." That the

place of residence of the vendor has nothing to do with the question, and that the principle of the case of *Holman* v. *Johnson* is sound, is further shown by the case of *Hodson* v. *Temple* (5 *Taunt.*, 181), decided by the court of common pleas in England. There, as it would seem, all the parties resided in London. The plaintiffs who were distillers, had sold spirituous liquors to the defendant with full knowledge that the latter intended to retail them, in express violation of the revenue laws. It was insisted, in defense to an action brought for the purchase money of the liquors, that the plaintiffs were *particeps criminis*, and could not recover. But Mansfield, Ch. J., said: "This would be carrying the law much further than it has ever yet been carried. The merely selling goods knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment; but to effect that it is necessary that the vendor should be a sharer in the illegal transaction."

Opposed to this series of cases, holding one uniform language, and sanctioned by such names as Mansfield, Buller, Kenyon, Abinger and others, I know of but a single English case, viz., that of *Langton and others* v. *Hughes*. (1 *Maule & Sel.*, 593). By a statute of 42 Geo. III., brewers were prohibited from using anything but malt and hops in the brewing of beer. The plaintiffs, who were druggists, had sold to the defendants, who were brewers, certain drugs, knowing that they were to be used contrary to the statute. In the 51 Geo. III., another statute was passed prohibiting druggists from selling to brewers certain articles, and among them those sold to defendants. The sale in question was made before the latter statute, but the suit was brought afterwards. The court held that the plaintiff could not recover. It is difficult to ascertain from the opinions the precise ground upon which the court intended to rest its decision. The case was so clearly within the terms of the statute of 51 Geo. III., that the judges were evidently induced

to resort to a somewhat strained construction of the previous statute, and even to an attempt to connect that with the statute passed after the sale, for the sake of sustaining the defence. Le Blanc, J., after stating the question, says: "That depends upon the provisions of 42 Geo. III., coupling them in their construction with those of 51 Geo. III." It is apparent, I think, upon a review of the whole case, that it was not very well considered, and that the decision was really produced by the reflex influence of the latter statute. This case, therefore, which does not appear to have been followed either in England or in this country, and which is virtually overruled by the subsequent case of *Pellecat* v. *Angell* (2 *Crompt., Mees. & Ros.*, 311), can have but little weight in opposition to the numerous authorities to which I have referred, going to establish the contrary principle.

There is another class of English cases which have been sometimes supposed to conflict with the doctrine advanced in *Faikney* v. *Reynous* and *Holman* v. *Johnson* (*supra*), but which, when the precise ground upon which they were decided is considered, will be found to support rather than to detract from the doctrine. That ground is this: that it was the express object of the plaintiffs in those cases, in selling the goods or lending the money, that they should be used for an unlawful purpose, and that such purpose entered into and formed a part of the contract of sale or loan. A brief reference to those cases will show that this is the principle upon which they rest. The first case of this class is that of *Lightfoot et al.* v. *Tennant* (1 *Bos. & Pull.*, 551). The action was upon a bond given for goods sold, and the defendant pleaded that the plaintiff sold the goods "in order that" they should be shipped to the East Indies without the license of the East India Company, in violation of an express statute. The issue upon this plea was found for the defendant, and a motion for judgment *non obstante veredicto* was denied. Eyre, Ch. J., argues, that the jury having found that the plaintiff sold the goods "in order that

they should be shipped, &c., it cannot be said that he had no interest in their future destination; that he may well have sold the goods for an enhanced price, relying exclusively upon the profits to be realized from the illicit trade for payment. He says: "It is a possible case, that a tradesman may wish to speculate in this contraband trade, and to do it by dividing the profits with some man of spirit and enterprise, but without capital. Such a man would stipulate that the goods which he sold should be put on board a ship under a foreign commission, and should be sent to Calcutta to be there sold. His share of the profits would be found in the price originally fixed on the goods, but his hopes of payment would rest entirely on the returns of this contraband trade." Again he says: "But the jury having found for the plea, the court cannot say that the plaintiff had nothing to do with the future destination of the goods; unless it was impossible to state a case in which they could have anything to do with it." The decision in this case clearly is based upon the fact, that the future use to be made of the goods entered into and formed a part of the contract of sale. There are two other English cases belonging to the same class. The first is that of *Cannan* v. *Bryce*, (3 *Barn & Ald.*, 179). The defendant had lent money to a firm, which afterwards became bankrupt, for the purpose of paying a balance due upon certain illegal stock-jobbing transactions, and which had been applied to that object. He having afterwards received money belonging to the bankrupts, the assignees brought their action to recover those moneys, and it was held that the defendant could not set off his demand for the money loaned. The other case is that of *McKinnell* v. *Robinson* (3 *Mees. & Wels.*, 434), which was an action of assumpsit for money lent. The defendant pleaded that the money was lent in a certain common gambling room, for the purpose of the defendant's illegally playing and gaming therewith; and on demurrer the plea was held good. In each of these cases it will be seen that the illegal use was the express object for which

the money was lent; and this is relied upon by the court in both cases in giving their judgment. In the case of *Cannan* v. *Bryce*, Abbott, Ch. J., says: "It will be recollected that I am speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object:" and in the case of *McKinnell* v. *Robinson*, Lord Abinger, in stating the principle by which the case was governed, says: "This principle is, that the repayment of money lent for the express purpose of accomplishing an illegal object, cannot be enforced."

It is worthy of note that the three cases last referred to present the views respectively of the heads of the three principal English courts, viz., Abbott, chief justice of the king's bench, Eyre, chief justice of the common pleas, and Abinger, chief baron of the exchequer; and their concurrence in resting their decisions upon the fact that the illegal object was in the contemplation of both parties, and formed a part of the original contract, goes strongly to confirm the doctrine of the cases of *Faikney* v. *Reynous*, *Holman* v. *Johnson*, &c. *(supra)*. Indeed the whole current of English authority goes to support those cases, with the single exception of *Langton et al.* v. *Hughes (supra)*. They have also frequently been referred to by the courts in this country as containing sound doctrine. *(De Groot* v. *Van Duzer*, 17 *Wend.*, 170; *Merchants' Bank* v. *Spaulding*, 12 *Barb. S. C.* 302; *Armstrong* v. *Toler*, 11 *Wheat.*, 258). In the latter case, Chief Justice Marshall refers to the case of *Faikney* v. *Reynous* in the following terms: "The general proposition stated by Lord Mansfield, in *Faikney* v. *Reynous*, that if one person pay the debt of another at his request, an action may be sustained to recover the money, although the original contract was unlawful, goes far in deciding the question now before the court. That the person who paid the money knew it was paid in discharge of a debt not recoverable at law, has never been held to alter the case."

The principles established by this strong array of authorities are in entire accordance with the case of *Talmage* v. *Pell* (3 *Seld.*, 328), decided by this court. It was a part of the contract in that case, between the banking company and the commissioners of the State of Ohio, that the bonds should remain in the hands of the agent of the state, to be sold on account of the banking company; and this fact is referred to and relied upon by Gardiner, J., by whom the opinion of the court was delivered. He says: "I am, for the reasons suggested, of the opinion that this bank had no authority to traffic in stocks as an article of merchandise, or to purchase them for the purpose of selling as a means for obtaining money to discharge existing liabilities: that as the object of the purchase in this case was known to both parties, and made a part of their contract, the debt for the purchase money cannot be enforced by the vendors, and that the collateral securities must stand or fall with the principal agreement." The case contains no intimation whatever that the mere knowledge, by the agents of the State of Ohio, that the banking company purchased the bonds with a view to a resale, would have defeated a recovery. On the contrary, such an inference was carefully guarded against by the learned judge who delivered the opinion, as appears from the extract just given.

I consider it, therefore, as entirely settled by the authorities to which I have referred, that it is no defence to an action brought to recover the price of goods sold, that the vendor knew that they were bought for an illegal purpose, provided it is not made a part of the contract that they shall be used for that purpose; and, provided also, that the vendor has done nothing in aid or furtherance of the unlawful design. If, in this case, the bank had had no right to purchase state stocks for any purpose, then the contract of sale would have been necessarily illegal, and the vendor would, perhaps, be precluded from all remedy for the purchase money. But here the purchase and sale for a lawful object was a contract which each party had a perfect

right to make. Suppose the banking company, although intending at the time of the purchase to use the stocks for trading purposes, had, the next day, abandoned this intention and deposited them with the comptroller; would this change of purpose reflect back upon the contract of purchase, if it was corrupt, and divest it of its illegal taint? This could hardly be pretended; and, if not, then the consequence of the doctrine contended for here, would inevitably be, that the vendor of the stocks, without having participated in any illegal act, or even illegal intent, but having simply known of such an intent subsequently abandoned, would be punished with a total loss of the property sold, and that for the benefit of the party alone guilty, if guilt could be predicted of such a transaction.

I am not aware of any principle which could justify this. The law does not punish a wrongful intent, when nothing is done to carry that intent into effect; much less, bare knowledge of such an intent, without any participation in it. Upon the whole, I think it clear, in reason as well as upon authority, that in a case like this, where the sale is not *necessarily per se* a violation of law, unless the unlawful purpose enters into and forms a part of the contract of sale, the vendee cannot set up his own illegal intent in bar of an action for the purchase money.

It follows, from this, that the sale of the stocks would have created a valid and legal obligation on the part of the banking company to pay the purchase money, but for the form of the security agreed to be taken in payment; and this brings me to the consideration of the second ground of defence, viz., that the North American Trust and Banking Company had no authority to issue negotiable promissory notes, payable at a future day; and consequently, that the contract which provided for their issue and for receiving them in payment, was illegal and void.

In considering this branch of the case, I shall not examine at length the questions so ably argued at bar, in regard to the nature of corporations and the limita-

tions of their powers, but shall assume it to have been established, for the purposes of this case, at least, that associations under the general banking law, even prior to the act of 1840 (*Laws of* 1840, 306, § 4), had no power to issue negotiable notes upon time; placing this assumption, however, not upon the safety fund act of 1829 (*Laws of* 1829, 167), but upon the general principle of law which limits corporations to the exercise of powers expressly given to them, or such as are necessarily incident thereto, and upon the statute confirmatory of that principle. (1 *R. S.*, 600, § 3.)

It follows, that in issuing the certificates or post notes delivered to the Morris Canal and Banking Company in consideration of the stocks transferred, the North American Trust and Banking Company exceeded its corporate powers. That those certificates were negotiable promissory notes, is clear. (*Bank of Orleans* v. *Merrill*, 2 *Hill*, 295; *Leavitt* v. *Palmer*, 3 *Comst.*, 19; *Talmage* v. *Pell*, 3 *Seld.*, 328). Does this act of the Trust and Banking Company, thus transcending its legitimate powers, so taint and corrupt the contract of sale as to deprive the vendors of the stocks of all remedy for the purchase money? The counsel for the claimants sought upon the argument to maintain that the sale of the stocks and the receipt of the certificates were distinct transactions; and, hence, that the debt created by the sale would remain, notwithstanding the illegality of the securities. In this, however, he is not sustained, I think, by the evidence. The proof seems to be clear, that the agreement to receive the certificates or post notes was simultaneous with and formed a part of the contract of purchase. It becomes necessary, therefore, to meet the question, whether the consent and agreement of the vendors to receive the certificates in payment, will prevent a recovery *in any form* for the stock sold.

It results, from what has been previously said, that there was nothing in the contract of sale, considered by itself, separately from the agreement in relation to the security, to impair the validity of the debt; but,

on the contrary, that the sale of the stocks created as valid and meritorious a consideration for the obligation assumed by the Trust and Banking Company as if the money had actually been deposited according to the tenor of the certificates. The objection to the claim, therefore, rests upon the nature of the securities alone, and acquires no additional force from the want of power in the Trust and Banking Company to traffic in stocks.

It has long been settled that contracts founded upon an illegal consideration, or which contemplate the performance of that which is either *malum in se*, or prohibited by some positive statute, are void. But the application of this rule to contracts made by corporations, the sole objection to which consists in their being *ultra vires*, is comparatively modern. The doctrine rests mainly upon three recent English cases, viz., *East Anglian Railway Company* v. *Eastern Counties Railway Company* (7 *Eng. Law and Eq. R.*, 505; *McGregor* v. *The Official Manager of the Deal and Dover Railway Company* (16 *id.*, 180); and *The Mayor of Norwich* v. *The Norfolk Railway Company* (30 *id.*, 120).

That a contract by a corporation, which it has no legal capacity to make, is void and cannot be enforced, it would seem difficult to deny; and this principle alone is abundantly sufficient to sustain the cases above cited, which were all actions founded upon and affirming the validity of the illegal contract.[1] But it is quite another question whether such a contract is so tainted with corruption, that the party dealing with the corporation will be refused all remedy in a suit proceeding upon the ground of a disaffimance of the contract, and asking only such relief as equity demands. Whether a contract of this nature can be fairly brought, consistently with either reason or adjudged cases, within the range of the maxim, *ex turpi causa non oritur actio*,

[1] Nassau Bank v. Jones, 95 N. Y. 123.

cannot be considered as settled by the cases referred to; especially, as in the last of those cases the court was equally divided, and it was only disposed of by one of the judges withdrawing his opinion with a view to an appeal.

Prior to the case of *East Anglian Railway Company* v. *Eastern Counties Railway Company (supra)*, the rule which denied all relief, in equity as well as at law, to any party to an illegal contract, had been generally applied only to cases where the contract was either *malum in se* or specifically prohibited by statute. It was wholly unnecessary to the decision of that case to resort to any extension of that rule; because, to enforce a contract against a party, which that party was incompetent in law to make, would, indeed, be, in the language of some of the cases, "to make the law an instrument in its own subversion." The courts, however, in that as well as the two subsequent cases, do appear to have been inclined to hold that contracts of corporations, which are *ultra vires* merely, come within the general rule which denies all aid to either party to a contract made in violation of law. But it will not be necessary here to pass upon the correctness of this doctrine advanced in those cases, as, in the view I take of this case, it falls clearly within an exception to that rule; and, for the purposes of this question, I shall concede: 1. That the issuing and delivery by the North American Trust and Banking Company of its promissory notes payable on time, was *ultra vires*, and that the effect of this upon the contract was the same as if it had been specifically prohibited under a penalty, and 2. That the notes issued were calculated and intended for circulation as money, and were, therefore, issued contrary to the inhibitions of the restraining act. These concessions are made for the purposes of this case only, and without intending definitely to decide the points conceded.

There are one or two classes of cases to which it will be necessary to refer in order to afford a clear view of the question here presented. The first consists in a

series of cases in which a distinction has been taken between those illegal contracts where both parties are equally culpable, and those in which, although both have participated in the illegal act, the guilt rests chiefly upon one. The maxim, *ex dolo malo non oritur actio* is qualified by another, viz., *in pari delicto melior est conditio defendentis.* Unless, therefore, the parties are *in pari delicto* as well as *particeps criminis*, the courts, although the contract be illegal, will afford relief, where equity requires it, to the more innocent party.

It was insisted by the counsel for the receiver, upon the argument, that *in no case* would relief be afforded to any party to an illegal contract, unless he applied for such relief, or, at least, had elected to disaffirm the contract while it remained *executory.* This position cannot, I think, be sustained. It overlooks distinctions which are clearly settled. The cases in which the courts will give relief to one of the parties on the ground that he is not *in pari delicto*, form an independent class, entirely distinct from those cases which rest upon a disaffirmance of the contract before it is executed. It is essential, to both classes, that the contract be merely *malum prohibitum.* If *malum in se*, the courts will in no case interfere to relieve either party from any of its consequences. But where the contract neither involves *moral turpitude* nor violates any *general* principle of public policy, and money or property has been advanced upon it, relief will be granted to the party making the advance: 1. Where he is not *in pari delicto;* or, 2. In some cases where he elects to disaffirm the contract while it remains *executory.* In cases belonging to the first of these classes, it is of no importance whether the contract has been executed or not; and in those belonging to the second, it is equally unimportant that the parties are *in pari delicto.* This will clearly appear upon a brief review of some of the leading cases.

The first case which I deem is material to notice is that of *Smith* v. *Bromley (Dough.*, 670, *in note).* The

plaintiff's brother having become bankrupt, and a commission having been taken out against him, the plaintiff advanced £40 to the defendant, who was the principal creditor, to induce him to sign the certificate. The action, which was brought to recover this money, was sustained. In reply to the argument that the plaintiff was seeking to recover back money paid upon an illegal contract, Lord Mansfield said: "If the act is in itself immoral, or violation of the general laws of public policy, then the party paying shall not have this action; for when both parties are equally criminal against such general laws, the rule is *potior est conditio defendentis*. But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover; and it is astonishing that the reports do not distinguish between violation of the one sort and the other." Two things are to be noted in this extract. That a distinction is taken between contracts *malum prohibitum* merely, and such as are immoral or contrary to general principles of policy; and also that stress is laid upon the fact that the law contravened in this case was intended to protect one party from oppression by the other. The first is a valid distinction, which runs through all the subsequent cases—the last was merely incidental to the particular case, and not essential to the principle. The first cases in which the principle was applied, were naturally those where the statute violated was intended for the special protection of the party seeking relief from some undue advantage taken by the other, because those were the cases in which the injustice of applying the same rule to both parties would be the most glaring. But it soon came to be seen that the principle was equally applicable to cases where the law infringed was intended for the protection of the public in general.

The case of *Jaques* v. *Golightly* (2 *W. Bl.*, 1073) was an action brought to recover back money paid for insuring lottery tickets. The defendant kept an office for insurance contrary to the statute 14 Geo. III., ch. 76. It was urged that the plaintiff being *particeps criminis*, and having knowingly transgressed a public law, was not entitled to relief; but the action was sustained by the unanimous opinion of the court. Blackstone, J., said: "These lottery acts differ from the stock-jobbing act of 7 Geo. II., ch. 8, because there both parties are made criminal and subject to penalties." The rule here suggested for determining whether the parties are *in pari delicto*, seems reasonable and just. There are, undoubtedly, other cases in which the parties are not equally guilty; but it is safe to assume, that whenever the statute imposes a penalty upon one party and none upon the other, they are not to be regarded as *par delictum*. In *Browning* *Morris* (2 *Cowp.*, 790), Lord Mansfield, after referring with approbation to the case of *Jaques* v. *Golightly*, reiterates the argument of Blackstone, J., in that case. He says: "and it is very material that the statute itself, by the distinction it makes, has marked the criminal, for the penalties are all on one side—upon the office-keeper."

The question next arose in the case of *Jaques* v. *Withy* (1 *Hen Black.* 65), which is identical with the case of *Jaques* v. *Golightly*, decided by the same court fifteen years before. The action was brought to recover back money paid for insurance to the keeper of a lottery insurance office, and it was held to lie. It will be seen that these two cases are not like that of *Smith* v. *Bromley* where an undue advantage was taken of the peculiar situation of the plaintiff; and that although some effort is made in *Jaques* v. *Golightly*, and by Lord Mansfield in *Browning* v. *Morris*, *(supra)*, to bring them within the reasoning of that case, they are really placed upon the broad ground that the parties are not *in pari delicto*, and, as evidence of this, the court rely upon the fact that the penalty was im-

posed upon the defendant alone. A similar question came before the court of kings bench in the case of *Williams* v. *Hedley* (8 *East*, 378), where the previous cases were ably and elaborately reviewed by Lord Ellenborough. The action was brought to recover back money which had been paid by the plaintiff to compromise a *qui tam* action pending against him for usury. The principle of the decision cannot be better stated than by transcribing the headnote of the reporter, which is this: "Money paid by A to B, in order to compromise a *qui tam* action of usury brought by B against A on the ground of a usurious transaction between the latter and one E, may be recovered back in an action by A for money had and received. For the prohibition and penalties of the statute of 18 Eliz., ch. 5, attach only on the informer or plaintiff or other person suing out process in the penal action making composition, &c., contrary to the statute, and not upon the party paying the composition; and, therefore, the latter does not stand, in this respect *in pari delicto*, nor is he *particeps criminis* with such compounding informer or plaintiff."

These are the leading English cases on this subject; and it is plain that they do not rest solely upon the ground that the statute infringed was intended to protect one party from acts of oppression or extortion by the other; and equally plain that relief is granted in this class of cases entirely irrespective of the question whether the contract be executed or executory. It was, in fact, *executed* in all these cases.

The series of cases here referred to have never been overruled. On the contrary, they have been expressly sanctioned and approved in several American cases. In *Inhabitants of Worcester* v. *Eaton* (11 *Mass.*, 368), Chief Justice PARKER, after referring to the cases of *Smith* v. *Bromley* and *Browning* v. *Morris* (*supra*), and to the distinction there taken, says: "This distinction seems to have been ever afterwards observed in the English courts; and being founded in sound principle, is worthy of adoption as a principle of common law in

this country." The case of *White* v. *Franklin Bank* (22 *Pick.*, 181), proceeds upon the same distinction. It is impossible, as it seems to me, to distinguish this case in principle from that now before the court. The Revised Statutes of Massachusetts *(ch.* 36, *sec.* 57) prohibited banks from making any contract "for the payment of money at a future day certain," under a penalty of a forfeiture of their charter. The plaintiff had deposited money with the defendant in February, to remain until the 10th day of August; and the action was brought to recover this money. It was objected that the contract was illegal and the parties *particeps criminis*, but the defense was overruled. This is by no means an anomalous case, as the counsel for the receiver upon the argument of this case seemed to suppose. On the contrary, it belongs clearly to the same class with the English cases just reviewed. WILDE, J., who delivered the opinion of the court, after referring to those cases, and quoting the remarks of Chief Justice PARKER in *Inhabitants of Worcester* v. *Eaton*, given above, says: "The principle is in every respect applicable to the present case, and is decisive. The prohibition is particularly leveled against the bank, and not against any person dealing with the bank. In the words of Lord Mansfield, 'the statute itself, by the distinction it makes, has marked the criminal.' The plaintiff is subject to no penalty, but the defendants are liable for the violation of the statute to a forfeiture of their charter."

Again, in the case of *Lowell* v. *Boston and Lowell Railroad Company* (23 *Pick.*, 24) where the objection was raised that the parties were *particeps criminis*, the same justice says: "In respect to offences in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offence is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both

parties are wrong-doers." The same doctrine was reiterated in *Atlas Bank* v. *Nahant Bank* (3 *Met.*, 581). The principle of these cases was also adopted by our own supreme court in the case *Mount* v. *Waite* (7 *John.*, 434). The action was to recover back money which the plaintiffs had paid to the defendants for insuring lottery tickets contrary to the policy of a statute passed in 1807. KENT, Ch. J., says: "The plaintiffs here committed no crime in making the contract. They violated no statute, nor was the contract *malum in se.* I think, therefore, the maxim as to parties *in pari delicto* does not apply, for the plaintiffs were not *in delicto.*"

This case is the last of the class to which I shall refer; and I think it would be difficult to find a series of cases, running through almost a century, more uniform and consistent in tone and principle and in the distinctions upon which they are based. They have never, so far as I am aware, been overruled; and I know of no principle which would justify this court in disregarding them. The doctrine seems to me eminently reasonable and just, and I discover no principle or public property to which it stands opposed. On the contrary, I concur in the sentiment which Judge Wilde, in *White* v. *Franklin Bank*, expresses thus: "To decide that this action cannot be maintained, would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to violate the statute by taking advantage of the unwary and of those who may have no actual knowledge of the existence of the prohibition, and who may deal with a bank without any suspicion of the illegality of the transaction on the part of the bank."

This language is as applicable to the case before us as to that in which it was used. It is said that all persons dealing with banks and other corporations are presumed to know the extent of their powers. This is no doubt technically true, and yet we cannot shut our eyes to the fact, that in very many cases it is a mere

legal fiction. If we take the present case as an example, if is plain that it would not have been easy for the Morris Canal and Banking Company with the charter of the Trust and Banking Company and the restraining act both before them, to determine whether the issue of these certificates in payment for state stocks would violate either; and yet, upon the doctrine here contended for, an honest mistake in this respect would visit upon the former company a forfeiture of the entire amount of stocks transferred, with the latter company, if disposed, might pocket. Such a principle would afford the strongest possible inducement for banks to transgress the law. All that they could get into their hands, by persuading others to take their unauthorized paper would be theirs. Under such a rule, arguments to make it appear that they have power to do what they really have not, might be made to constitute the most available portion of their capital; and unauthorized dealing in large amounts, with foreign states or corporations not familar with our laws, the most profitable branch of their business. These considerations go, in my judgment, to strengthen and confirm the doctrine of the cases referred to, which hold that relief may be granted to the more innocent, when the parties are not *in pari delicto.*

The rule laid down in those cases for determining which is the more guilty party is directly applicable to the present case, so far as the transaction is held to fall within the provisions of the restraining act. It has been conceded, as was contended by the counsel for the receiver upon the argument, that the issuing of the certificates in this case was a violation of §§ 3, 6 and 7 of the act concerning unauthorized banking. (1 *R. S.*, 712). It will be seen, by referring to those sections, that the penalties are imposed exclusively upon the corporation violating the provisions of the act, and upon its officers and members. So far, therefore, as the defence is based upon a violation of the restraining act, there is that statutory designation of the guilty party upon which most of the cases to which I have

referred are made to rest. But it is obvious that the general principle for which I contend applies equally to that branch of the defence which rests upon the ground that the act of the banking company in issuing the notes, was *ultra vires* and against public policy. The imposition of the penalties for a violation of the restraining law upon the corporation alone, does not make it the guilty party, but it is simply evidence that the legislature so regarded it; and the reasons are equally strong for fixing the principal guilt upon the same party where its acts merely violate the principle of public policy. Although persons dealing with corporations are, for certain purposes, presumed to know the extent of their corporate powers, yet this is by no means a safe rule by which to measure the moral delinquency of the respective parties. To me, therefore, it seems plain, that whether we regard the act of the Trust and Banking Company in issuing the certificates in question as a violation of the restraining law, or as simply *ultra vires*, or as against public policy, the corporation is to be regarded as comparatively the guilty party.

I wish here briefly to refer to another class of cases decided in this state, and known as the Utica insurance cases, not as authority for my conclusion, but by way of illustrating the distinctions to which I have averted. The first of these is *The Utica Insurance Company* v. *Scott* (19 *John.*, 1). The action was upon a promissory note discounted by the insurance company in the ordinary way of discounting by a bank. It was held that the insurance company had no power to discount notes; and that in so doing it had violated the restraining act. But the court say: "In analogy to the statute against gaming, the notes and securities are absolutely void, into whatever hands they may pass; but there is a material distinction between *the security and the contract* of lending. The lending of money is not declared to be void, and, therefore, whenever money has been lent, it may be recovered, although the security itself is void." Judgment was,

however, given for the defendant in that case, because the action was brought upon the note alone. The next case was that of *The Utica Insurance Company v. Kipp* (8 *Cow.*, 20). This, also, was an action upon a note discounted by the insurance company; but the declaration also contained a count for money lent. The plaintiff recovered: and the court say: "The illegal contract, if any, was not the loan, for the plaintiffs had a right to loan the money to the defendants; but it was the agreement to secure the loan by a note discounted. Avoiding what was illegal, does not avoid what was lawful. *The action for money lent, is rather a disaffirmance of the illegal contract.*" Similar decisions were made in three subsequent cases, viz: *The Utica Insurance Company* v. *Cadwell (Wend.*, 296); *Same* v. *Kipp*, (3 *id.*, 369); and *Same* v. *Bloodgood* (4 *id.*, 652).

These cases have never been overruled; and yet, I think I may say, they have generally been regarded with some suspicion as to their soundness. In *New Hope Company* v. *Poughkeepsie Silk Company* (25 *Wend.*, 648), Nelson, J., in speaking of them, says: "Whether the doctrine of these cases is well founded and may be upheld upon established principles or not, or whether the result was not ultimately influenced by the peculiar phraseology and powers of the charter of The Utica Insurance Company, in respect to which they arose, it is not necessary at present to examine. I am free to say, in either aspect, I should have great difficulty in assenting to them." There is, undoubtedly, "great difficulty" in reconciling these cases with the settled rules in regard to illegal contracts; and the difficulty consists precisely in this, and the court, in the Utica insurance cases, have given to the guilty party the benefit of a principle which is only applicable to the more innocent. In the first case in which the insurance company recovered, viz., *The Utica Insurance Company* v. *Kip*, the court cite and rely upon the following passage from Comyn: "Where the action is in affirmance of an illegal contract, the object of

which is to enforce the performance of an agreement prohibited by law, such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and instead of endeavoring to enforce it, presumes it to be void and seeks to prevent the defendant *from retaining the benefit which he derived from an unlawful act*, there it is consonant to the spirit and policy of the law that he should recover." (1 *Comyn on Contracts, part* 2, *ch.* 4, *art.* 20.) Comyn cites, as authority for this passage, the case of *Jaques* v. *Withy* (1 *Hen. Bl.*, 65), which is one of the cases to which I have referred, in which the plaintiff recovered on the ground that he was not *in pari delicto* with the defendant; and on turning to that case it will be seen that the passage is copied *verbatim* from the argument of Sergeant Adair, counsel for the plaintiff. It is thus made apparent that the doctrine of the Utica insurance cases is built, in part at least, upon the principles and arguments which lie at the foundation of the class of cases just passed in review. More can scarcely be needed to justify the doubt which has been cast upon these insurance cases. How principles, appropriately used to sustain a recovery against a party, upon the express ground that he is the party upon whom the prohibition and penalties of the law attach, can be made available to justify a recovery by a party so situated, is certainly difficult to comprehend.

But, notwithstanding the misapplication to these cases of the principles for which I contend, the cases themselves afford strong evidence of the appreciation, by the court, of the soundness of those principles. Indeed, few, as it seems to me, will be found to deny either the justice or policy of the rule which refuses to permit the guilty party to retain the fruits of an illegal transaction at the expense of the more innocent. But were it otherwise, the rule, as I have shown, is undisputably established; and that the present case falls within that rule is entirely clear. We have next, then, to ascertain the relief to which

the Morris Canal and Banking Company would, if the claimant upon the record, be entitled.

The illegal contract itself is of course void, and no part of it can be enforced. It is impossible, I think, to sustain the reasoning adopted in the Utica insurance cases; by which that part of the contract which embraces the loan (in this case, the sale) is separated from the portion relating to the security, and upheld as a distinct and valid contract. The contract there, as here, was entire; and it is contrary to all the rules which have been applied to illegal contracts to discriminate between their different parts, and hold one portion valid and the other void.[1] Recoveries are not had in such cases upon the basis of the *express* contract, which is tainted with illegality; but upon an implied contract founded upon the moral obligation resting upon the defendant to account for the money or property received. The claim presented by the State of Indiana to the referees was in general terms, and broad enough to embrace a demand arising upon an implied contract to pay for the bonds transferred; and it has been repeatedly held that a corporation may become liable upon such a contract founded upon a moral obligation, like that existing in this case. (*Bank of Columbia* v. *Patterson, Adm.*, 7 *Cranch*, 299; *Danforth* v. *Schoharie Turnpike Company*, 12 *John.*, 227; *Bank of U. S.* v. *Dandrige*, 12 *Wheat.*, 64.)

It follows, from these principles, that if the Morris Canal and Banking Company was the claimant upon the record, it would be entitled to recover, not the specific balance due upon the certificates, nor the price agreed to be paid for the stocks, but so much as the stocks transferred were reasonably worth at the time of such transfer, with interest, deducting therefrom whatever has been actually paid in any form by the North American Trust and Banking Company for the same, and leaving, however, the contract of sale, so far

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[1] McGregor v. Donelly, 67 Cal., 151.

as it has been executed by payment, or its equivalent, undisturbed.

The only remaining question is, whether the State of Indiana has succeeded to the rights of the Morris Canal and Banking Company in this respect. If, as it seems to have been held by the supreme court both at special and general terms, the Canal and Banking Company acted in the sale of the stocks as the agent of the State of Indiana, then, of course, the latter, as the principal, is the proper party here. But aside from this, I cannot doubt that a court of equity would hold, upon the face of the transaction, that it was the intention of the Morris Canal and Banking Company to transfer to the state its entire claim against the Trust and Banking Company, growing out of the sale of the stocks, and would, if necessary, compel any formal defects in such transfer to be supplied; and as the proceeding here is of an equitable nature, the court upon well settled principles, will regard what ought to be done as having been done.

The judgment of the supreme court should be modified in accordance with these principles, and the proceedings remitted.

MITCHELL, J., delivered an opinion in favor of affirming the judgment of the supreme court at general term. He was of the opinion that the evidence did not establish that the Morris Canal and Banking Company, or the State of Indiana, had knowledge when the bonds were sold that the Trust and Banking Company purchased them for an illegal purpose, or with intent to make an illegal use of them, and that the last-named company, at the time of the purchase, in 1839, had authority to make and issue notes or certificates payable at a future day. He held, that associations organized under the general banking law were not subject to the provisions contained in the safety fund act (*Laws of* 1829, 165, § 35), prohibiting moneyed corporations subject to the provisions of that act from issuing bills or notes, payable on time; and that such

associations might lawfully issue such notes for a legitimate purpose, until prohibited by the act of 1840. (*Laws of* 1840, § 4).

DENIO, Ch. J., was also in favor of affirming the judgment, on substantially the same grounds as those stated by Judge MITCHELL.

COMSTOCK, HUBBARD, T. A. JOHNSON and WRIGHT, Js., concurred in the foregoing opinion delivered by Judge SELDEN, and were in favor of modifying the judgment in accordance with the principles stated in that opinion.

A. S. JOHNSON, J., dissented. He was in favor of reversing the judgment rendered at general term and affirming that rendered at special term.

Judgment modified.

Motion for Reargument.

At the ensuing September term of the court the counsel for the receiver, the remittitur having been stayed, made a motion for a reargument of the foregoing case. On such motion Messrs. N. Hill, Samuel Beardsley and G. C. Bronson, of counsel for the receiver, submitted the following printed argument:

Until the decision of this case, it was supposed to be well settled that a loan of money, which the lender knows is to be applied to an illegal purpose, is an illegal contract, and that a sale of goods, which the seller has notice the purchaser intends to use in an illegal way is also illegal: that where land is demised, knowingly to be used for an illegal purpose, the agreement for the payment of rent is illegal and void: and that the same rule applies where personal property is knowingly let to be used in violation of law. These are general rules, to some of which exceptions have been allowed by certain cases commonly known as revenue cases, which will be hereafter considered. But the authorities in favor of the general principle have been supposed to be entirely decisive. (*Chit. on Contracts*, 420–423, 695; *McKinnell* v. *Robinson*, 3 *Mees. & Wels.*, 435; *Peck* v. *Briggs*, 3 *Denio*, 107; *Ruckman* v. *Bryan*, *id.*, 340; *Griffith* v. *Wells*, *id.*, 226; *Cannan* v. *Bryce*, 3 *Barn & Ald.*, 179; *Langton* v. *Hughes*, 1 *Maule & Selw.*, 593; *Lightfoot* v. *Tenant*, 1 *Bos. & Pul.*, 356; *Story on Confl. of Laws*, 2d ed., §§ 253, 254; *Talmage* v. *Pell*, 3 *Seld.*, 328; *Bank of Michigan* v. *Niles*, 1 *Doug., Mich.*, 401; *S. C.*, *Watkins' Ch., Mich.* 99; *The Gas Company* v. *Turner*, 5 *Bing., N. C.*, 666; *S. C.*, 6 *id.*, 324; *Cundell* v. *Dawson*, 4 *M. G. & S.*, 376; *Brown* v. *Duncan*, 10 *Barn & Cress.*, 93; *Smith* v. *Mawhood*, 14 *Mees. & Wels.*, 452; *White* v. *Buss.*, 3 *Cush.*, 448; *Hodgson* v. *Temple*, 5 *Taunt.*, 181; 23 *Am. Jurist*, 1, and onward.)

But the opinion of the court in this case seems to be in direct conflict with the principle which has been stated; for His Honor, Judge Selden, in pronouncing that opinion, says: "It is no defence to an action brought to recover the price of goods sold that the vendor *knew* that they were bought for an *illegal* purpose, provided it is not made *a part of the contract* that

they *shall be used* for that purpose; and, provided also, that the vendor has done nothing *in aid or furtherance* of the unlawful design," beyond the mere sale with knowledge of the illegal intent of the purchaser.

We commenced by stating general rules of law applicable to contracts, and not exceptional cases, as smuggling contracts made in a foreign country, or domestic contracts, where property is sold to be used in violation of a mere revenue law, the sale not being expressly prohibited; and we understand Judge SELDEN to affirm a general principle, and not an exception to one. Special contracts, like those last mentioned, if maintainable at all, must stand upon principles peculiar to themselves, but which have no application to the case in which the opinion of Judge SELDEN was given.

The first case referred to by his honor as an authority for his opinion is *Faikney* v. *Reynous*, (4 *Burr.*, 2069). In that case, the plaintiff and another person had met with heavy losses in stock-jobbing transactions in which they had been jointly engaged. An act of parliament prohibited the payment of all such losses, thereby making it illegal to do so; yet the plaintiff had paid the amount thus lost, for one-half of which the defendant and another person gave the bond on which this action was brought; and it was held that the plaintiff might recover. Judge SELDEN says the question in that case was "somewhat analogous" to the one on which his opinion was pronounced, although he does not explain in what the analogy consists. In the case before him, the question was, whether a sale of property, knowing it was bought for an illegal purpose, was a legal contract. The purchaser, as it was assumed the seller knew, intended thereafter to "make an illegal use of the property purchased." But in *Faikney* v. *Reynous* the plaintiff had previously made the illegal payment; and the question was whether a bond to reimburse what had already been advanced illegally was valid.

It was not contemplated in that case that the plaintiff should thereafter make any illegal use of the money to be paid on the bond, or of any other money. He had already broken the law by making the illegal payment, and the only design of the bond was to restore to him what he had voluntarily and illegally parted with. Thus in *Faikney* v. *Reynous*, the question was whether it was legal to engage to repay money previously advanced in violation of law; whereas in this case the question was whether an agreement to sell and transfer

property, knowing it was bought to be used thereafter for an illegal purpose, was a lawful contract.

We can see no analogy between these cases, nor can we see upon what principle the judgment in the first is an authority for the last. It might be added, if that were necessary, that *Faikney* v. *Reynous*, is of no authority for any purpose, having been overruled and wholly discredited. (23 *Amer. Jur.*, 18-21; *Paley's Agency, by Dunlap*, 118-120, *and notes; see at large the article above referred to in the Amer. Jurist; Aubert* v. *Maze*, 2 *Bos. & Pul.*, 371; *Mitchell* v. *Cockburn*, 2 *Hen. Black.*, 379; *Exparte Bell*, 3 *Vesey, Jun.*, 372; *Exparte Daniels*, 14 *Vesey*, 191; *Ottley* v. *Brown*, 1 *Ball & Beat*, 360; *Cannan* v. *Bryce*, 3 *Barn & Ald.*, 179; *Bensley* v. *Bignold*, 5 *Barn & Ald.*, 335.)

Judge Selden next refers to a class of cases which he regards as "identical in principle,—these are his words,—with the case before him; that is *Hadman* v. *Johnson (Cowp.*, 341); *Biggs* v. *Lawrence* (3 *Durn. & East.*, 454); *Clugas* v. *Penaluna* (4 *Durn & East.*, 465); *Wamell* v. *Reed* (5 *Durn. & East.*, 599); *Pellicat* v. *Angell* (2 *Crompt., Mees. & Ros.*, 311).

These cases show that a sale of property out of England, the seller not being a British subject, is valid, although he knows that the purchaser intends to smuggle the property into England. But this, as the cases also show, is because the contract, being made in a foreign country and by a seller not a British subject, is in no sense made under or in reference to the law of England. Had the seller been a subject of the British crown, the contract, although made in a foreign country, would have been illegal, as it also would have been if made in England, whether the seller were a subject or an alien.

These foreign contracts, resting on the grounds stated, would seem to me to be in no respect "*identical in principle*" with domestic contracts.

The next case referred to by Judge Selden is *Hodgson* v. *Temple* (5 *Taut.*, 181). That was a contract made in England, under English law; and it must be admitted that the language of Sir James Mansfield, Ch. Jr., as there stated, is broad enough to include such a case as that in which the opinion in question was given, and if applicable to such a case, is an authority more or less controlling for that opinion. Chief Justice Mansfield is reported to have said that "*the merely* selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his

just right of payment; but to effect that it is necessary that the vendor should be a sharer in the illegal transaction."

Now, in order to understand the true meaning of this remark, and to allow it all the force which it is justly entitled to, it is necessary to see what the case was in which it was made; for a remark, although general in its terms, must be understood as having a particular reference to the subject under consideration, and cannot in reason be allowed to have a broader application. A general observation of a judge, in giving judgment, may be perfectly correct in reference to the case before him, and yet may be as clearly wrong when applied to a case of a different character, although falling within the general terms used.

The case of *Hodgson* v. *Temple* was an action to recover for spirituous liquors sold and delivered by the plaintiff to the defendant, to be used in his rectifying distillery, as the plaintiff knew. The defendant, as the plaintiff also knew, was at the same time a licensed retailer of such liquors, and as such was prohibited from being concerned in a distillery. It was argued that the plaintiff, having sold the spirits with knowledge that the purchaser intended to use them in violation of law, could not recover; and we admit that if the general rule, which disables a party from recovering for goods sold to be used illegally, applies to such a case as that was, the plaintiff was not entitled to recover, and the judgment rendered was erroneous. But this rule, although it applies universally where anything is prohibited with a view to morality or public policy, and also where the object is to protect buyers and consumers against the frauds of manufactures or sellers; yet, according, to the English revenue cases, it does not apply where the design of the prohibition is merely to secure the due collection of revenue, the sale itself not being forbidden. Such was the case of *Hodgson* v. *Temple*. The sale of liquor, although the plaintiff knew it was bought to be used illegally, was not prohibited; the prohibition was, that the defendant, a retailer, should not also be a distiller. Had the sale been prohibited, it would have been illegal although the sole object in view was the collection of revenue. (*Chit. on Contr.*, 420, 698; *Cope* v. *Rowlands*, 2 *Mees. & Wels.*, 153, 157; *Smith* v. *Mawhood*, 14 *Mees & Wels.*, 452.) But the prohibition in the case of *Hodgson* v. *Temple* being only personal to the defendant, that he, a retailer, should not be concerned in distilling, &c., a sale to

him of spirits, which he intended to use in violation of the prohibition, was not illegal; the object of the prohibition being merely the due collection of revenue.

The soundness of the class of cases to which *Hodgson v. Temple* belongs has frequently been questioned in England, and learned judges there and in this country have not hesitated to affirm that the distinction on which they proceed "cannot be maintained upon the basis of any sound and fair argument." (*Territt* v. *Bartlett*, 21 *Verm.*, 188; *Cope* v. *Rowlands*, 2 *Mees. & Wels.*, 153, *Parke, B.*; *Greenleaf's Overruled Cases*, 64, 255; *Booker* v. *Wood*, 3 *N & Man.*, 96, *Littledale, J.*; *Story's Confl. of Law*, §§ 253–255.) This consideration certainly admonishes us not to treat these cases as evidence of any general rule of law applicable to illegal contracts, for that would be to bring them into direct conflict with all the cases on that subject. The truth is, they are at best exceptional cases, maintaining peculiar views as applicable to a particular class of contracts. And looking at them as decided on a principle applied to sales of property which the purchaser intends to use in violation of a mere revenue statute, it is plain that, whether sound or unsound, they can have no bearing on the present case.

The general principal which forbids a recovery by a seller, for goods sold by him with knowledge that the purchaser intends to use them illegally, is thus stated by Chief Justice Shaw, in *White* v. *Buss* (3 *Cush.*, 448). He says, it is "well settled by the authorities that any promise, contract or undertaking, the performance of which would tend to promote, advance or carry into effect an object or purpose which is unlawful, is in itself void, and will not maintain an action. The law which prohibits the end will not lend its aid in promoting the means designed to carry it into effect; and in this respect the law gives no countenance to the old distinction between *malum in se* and *malum prohibitum*. That which the law prohibits, either in terms or by affixing a penalty to it is unlawful, and it will not promote in one form that that which it declares wrong in another."

These views are undeniably correct, unless, perhaps, where the law which a purchaser intends to violate is a prohibition, having reference merely to the collection of revenue. That exception, if allowable at all, was obviously not in the mind of the chief justice when he prepared this opinion, nor was it at all necessary to advert to it in that case. He intended to state a gen-

eral principal, and did so with his accustomed clearness and force. Chitty, in stating the same principle, expressly excludes revenue prohibitions. He says, "where a statute *having in view* the protection or general benefit of the *public*, or the prevention of a *fraud*, expressly or impliedly renders it illegal to make or use certain articles in a particular manner, or for certain special purposes, *the price of goods sold with a knowledge* of the intention to contravene the provisions of the act, and in furtherance of the illicit object, cannot be recovered." (*Chit. on Contr.* 422-424, *Amer. ed.*, 1840.)

Such is the general rule. But where the design of the purchaser is to use the property bought in violation of a mere revenue prohibition, the sale, according to the English cases, is not illegal, although the seller has full notice of that illegal intent. The case of *Hodgson* v. *Temple* was of that peculiar character, and was decided on that distinction, as is fully shown by subsequent cases. (*Brown* v. *Duncan*, 10 *Barn. & Cres.*, 93; *Cope* v. *Rowlands*, 2 *Mees. & Wels.*, 149; *Wetherill* v. *Jones*, 3 *Barn. & Adol.*, 221; *Smith* v. *Mawhood*, 14 *Mees. & Wels.*, 452; *Cundell* v. *Dawson*, 4 *M., G. & S.* 376; *Chit. on Con'r.*, 420-423; *Griffith* v. *Wells*, 3 *Denio*, 226; *Law* v. *Hudson*, 11 *East.*, 300; *Wheeler* v. *Russell*, 17 *Mass.*, 258; *Bensley* v. *Bignole*, 5 *Barn. & Ald.*, 335; *Tyson* v. *Thomas*, *McC. & Y.*, 119; *Little* v. *Poole*, 9 *Barn. & Cres.*, 192; *Foster* v. *Taylor*, 5 *Barn. & Adol.*, 887; *Johnson* v. *Hudson*, 11 *East*, 180; *Spurgeon* v. *McIlwaine*, 6 *Hammond*, 442.)

The law intended to be violated, in the present case, had no reference to revenue, but was intended to promote sound policy and the public interest; and, therefore, as we respectfully submit, the case of *Hodgson* v. *Temple*, if rightly decided, is inapplicable, as an authority.

Judge Selden, after quoting the smuggling cases already mentioned, and *Hodgson* v. *Temple*, adds: "Opposed to this series of cases, holding one uniform language and sanctioned by such names as Mansfield, Buller, Kenyon, Abigner and others, I know of but a single English case, viz., that of *Langton and others* v. *Hughes* (1 *Maule & Selw.* 593)", which he thinks "was not very well considered;" nor, as he remarks, does it "appear to have been followed either in England or in this country," but was "virtually overruled by the subsequent case of *Pellicat* v. *Angell*, (2 *Crompt., Mees. & Ros.*, 311)." On these grounds, his honor says it "can

have but little weight in opposition to the numerous authorities, to which "he had referred, going to establish the contrary principle."

That *Langton* v. *Hughes* is exactly in point to maintain the converse of the position of Judge Selden, is, in effect, conceded by him, and will fully appear by examining the case. If, as is observed by the learned judge, it has not "been followed either in England or in this country," it is, as we suppose, simply because no case precisely like it has come up for judgment. It has, as far as we know, never before been called in question, and has been over and over again referred to as sound in principle. (*Cannan* v. *Bryce*, 3 *Barn. & Ald.* 179; *The Gas Light Company* v. *Turner*, 5 *Bing. N. C.*, 666; *Cundell* v. *Dawson*, 4 *M., Gr. & S.*, 376; *Forster* v. *Taylor*, 5 *Barn. & Adol.*, 887; *De Begnis* v. *Armistead*, 10 *Bing.*, 107; *McKinnell* v. *Robinson*, 3 *Mees. & Wels.*, 434; *Peck* v. *Briggs*, 3 *Denio*, 107; *Ruckman* v. *Bryan*, *id.*, 340; *Ruckman* v. *Pitcher*, 1 *Comst.*, 409; *Ex parte Bell*, 1 *Maule & Selw.*, 751; *Morgan* v. *Groff*, 5 *Denio*, 364; *Perkins* v. *Savage*, 15 *Wend.*, 412; *De Groot*, v. *Van Duzer*, 20 *id.*, 396; 23 *Am. Jurist*, 14; *Haydon* v. *Davis*, 3 *McLean*, 278; *Story on Confl. of Laws*, §§ 253–255.) How *Langton* v. *Hughes*, which was the case of a contract made in England, could have been "virtually overruled" by the case of *Pellicat* v. *Angell*, where the contract was made out of England, and not under English law, no reference on the argument or in the decision of that case being made to the former, is what we cannot understand; nor are we able to see that the case of *Langton* v. *Hughes* is at all "in opposition" to either of the authorities referred to by Judge Selden. That it stands in direct antagonism to the position of the learned judge, is, in effect, stated in his opinion; and how far it should be regarded as a dubious case may be determined by looking at the authorities referred to at the commencement of this review. Loans of money, sales of goods, demises of real estate and the letting of personal property, all stand on one and the same principle. If the design is known to be a violation of the law, no court of justice will aid either party.

Judge Selden next refers to a class of cases in which, as he says, "*the express objects of the plaintiffs*," in selling the goods or lending the money, was, "that they should be used for an unlawful purpose; and that such purpose *entered into* and *formed a part* of the contract of sale or loan." *Lightfoot* v. *Tenant* (1 *Bos. & Pul.*,

551), *Cannan* v. *Bryce* (3 *Barn. & Ald.*, 179), and *McKinnell* v. *Robinson* (3 *Mees. & Wels.*, 434), are referred to as such cases.

We are unable to see that in either of these cases the plaintiff had any such object as is imputed to him, or that it "*formed a part of the contract*" that the money or property should be applied to the "unlawful purpose" which the defendant had in view. It was no part of the contract of the plaintiff that the defendant should violate the law, although means were advanced and furnished, knowing that the defendant intended to use them in that way.

In *Lightfoot* v. *Tenant*, the action was on a bond given by the defendant to the plaintiff, for goods sold and delivered the plaintiff, the seller knowing that the defendant intended to dispose of them in a manner prohibited by an act of parliament. In one aspect of the case, as viewed by Chief Justice Eyre in pronouncing judgment, the plaintiff might have been interested in the ultimate illegal use to be made of the property, which would certainly have been a fatal objection to a recovery. But the case was not determined on this ground alone, for it was held to be a good defence to the action, if the goods were sold "*to the defendant for the purpose of enabling him*" to dispose of them illegally. The defendant bought them for such a purpose, as the plaintiff knew, but it formed "*no part of the contract*" that they should be so used by the defendant.

In *Cannan* v. *Bryce*, the plaintiff lent money to the defendant to enable him to pay stock-jobbing losses, such payments being prohibited by statute. This loan was held to be illegal, because the plaintiff knew that the money was obtained to be applied to this illegal purpose, and not because it was "*part of the contract*" that it should be so applied. It is unnecessary to speak particularly of the case of *McKennell* v. *Robinson*. It affirms, as the others do, that a loan or sale to a party for the purpose of enabling him to accomplish an illegal object, is itself illegal. Neither of these cases, as we read them, countenances the suggestion that the loan or sale is only illegal when the lender or seller makes it "*a part of the contract*" that what is lent or sold shall be used or applied illegally.

In the case of *Talmage* v. *Pell* (3 *Seld.*, 328), referred to by Judge Selden, it is true that it was made a part of the contract that the stocks should be sold. That, certainly, did not make the sale an innocent one;

it was, no doubt, illegal with that ingredient in it; and the case does not intimate that, but for this stipulation, the sale would have been legal. It was argued, on the sole ground that bare knowledge of the illegal purposes in making the purchase of the stocks, made the sale illegal, and we suppose the court intended so to hold, without qualification or restriction. The court did not suggest that the sale would have been legal, but for the agreement that the stocks should be sold, nor was any such distinction taken by counsel on the argument.

We have now adverted to all the cases on which Judge Selden rests his opinion on the point referred to; and we respectfully submit that they wholly fail to sustain it. We therefore dismiss this point and proceed to an examination of other parts of the opinion.

Where a statute, violated by an illegal contract, was made for the protection of a particular class of persons against another, one of the parties to the contract falling within the class intended to be protected by the statute, there, although both concur in the violation, yet the party entitled to protection may disaffirm the contract, and recover for what he has paid or advanced on it; and this, although no statute in terms gives to him such a right of action.

This is on the supposition that he may have been oppressed, deluded or imposed on by the other party to the contract, and is, therefore, entitled to redress. Such is the theory as to statutes of this character; and the same relief, under like circumstances of oppression, imposition, hardship or undue influence, may be given by the common law; for, where "one holds the rod and the other bows to it," the parties cannot be in *pari delicto*. (*Smith on Contracts*, 189, 190; 2 *Comyn on Contracts*, 113, 117, 119; *Schroeppel* v. *Corning*, 2 *Denio*, 236; *Smith* v. *Bromley*, 2 *Doug.* 670; *Howson* v. *Hancock*, 8 *Durnf. & East*, 577; *Jacques* v. *Colightly*, 1 *Wm. Bl.*, 1073; *Browning* v. *Morris*, *Cowp.* 790; *Williams* v. *Hedley*, 8 *East*, 378; *Thistlewood* v. *Cracroft*, 1 *Maule & Selw.*, 500; *Jaques* v. *Withy*, 1 *Hen. Bl.*, 65; *Mount* v. *Waite*, 7 *John.*, 434; *Smith* v. *Cuff*, 6 *Maule & Selw.*, 160; *Chit. on Contracts*, 634, 635; *Addison on Contracts*, 235, 236; *Broom's Legal Maxims*, 327; *Osborne* v. *Williams*, 18 *Ves.*, 279; *Reynell* v. *Sprye*, 13 *East's Law and Eq. R.*, 74; *Story's Eq. Jurisprudence*, § 300.)

We do not assert positively that the principle last

stated will aid a party to a contract which violates the common law, although we suppose it will. But it is unnecessary to consider that question. That the principle applies universally, where the statute violated was made for the protection of one class of persons against another, would seem, upon the authorities, to be incontrovertible. Lord Mansfield said, in the case of *Clarke* v. *Shee (Cowp.*, 197): "There are two sorts of prohibitions created by positive law in respect to contracts. 1st. To prevent weak or necessitous men from being overreached, defrauded or oppressed. There the rule *in pari delicto, potior est conditio defendentis*, does not hold; and an action will lie, because where the defendant *imposes* upon the plaintiff it is not *par delictum*. * * * * * The next sort of prohibition is founded upon general reasons of policy and public expediency. There both parties offending are equally guilty, *par est delictum, et potior est conditio defendentis*."

Where a prohibition of the first sort, looking to the classification of Lord Mansfield, is violated, the party imposed upon is relieved, because not in *pari delicto* with the other. It would be bootless to inquire whether one who is induced by weakness or imposition, or coerced by his necessities, to concur in an act which violates the law, is at all in fault. Lord Chancellor Talbot held the negative on this question (*Bosanquett* v. *Dashwood Tal. Ca. in Eq.*, 37), and he does not stand alone in that opinion. The common phrase, however, is, that the party of whose condition advantage is taken, although himself not wholly faultless, is not in equal *delictum* with the other. The distinction may not be practically of any moment, for where the statute violated was made for the protection of one class against another, the former is entitled to be relieved, as, in every view of the question, not involved in equal guilt with the latter. And, so far as respects the violators of statute law, this, as we understand it, is the length and breadth of the principle, assuming that there is no provision which, in terms, authorizes one offender to recover of another. For the correctness of this position the authorities referred to above may, as we think, be safely appealed to.

But Judge Selden has taken a different view of this question in the opinion under consideration. The facts on which this opinion was given, so far as is material to a right understanding of the question, were these: the Morris Canal and Banking Company agreed to

sell stocks of the State of Indiana to the *North American Trust and Banking Company*, for which the latter were to give their negotiable certificates of deposit, payable at future periods; and the stocks and certificates were delivered by the respective parties according to their engagements. This contract was held by the learned judge *to be illegal*, in which the court must have concurred with him, for the judgment rendered was not that a recovery could be had to the *amount agreed* by the special contract of sale, but that contract being illegal, it was adjudged the law would *imply a promise* to pay *the value* of the stocks at the time of their sale and delivery, and to that extent the seller might recover. As the general position, that an action will not lie for money or property paid or delivered on an illegal contract, was conceded, the court must have found it necessary, in order to arrive at the above conclusion, to discover some principle which would take this *advance* of stocks on the illegal contract out of the well established rule of law which has just been stated. And that principle, according to the opinion, was, that *The Morris Canal and Banking Company*, in selling the stock, was *less guilty* than the *Trust and Banking Company* was in buying them.

The precise ground on which the court adjudged the contract for the sale and delivery of the stocks to be illegal, may, perhaps, be left in some doubt; but we understand Judge Selden and the court to hold that the *Trust and Banking Company* had no legal right to issue such certificate of deposit as were agreed to be received for the stocks sold, and, therefore, the contract of sale were illegal; as it also was, because the certificates would be and were when issued, a violation of the restraining law; which, according to the opinion, imposes a penalty only on the party issuing illegal paper, and not on one who procures such paper to be issued. The statute, as was said, thus marked the *Trust and Banking Company* as the chief offender; and *The Morris Canal and Banking Company*, not being in *pari delicto*, though unable to enforce the express contract, might recover on an implied one.

In the course of his opinion, Judge Selden says: "the cases in which the courts will give relief to one of the parties, on the ground that he is not in *pari delicto*, form an independent class, entirely distinct from those cases which rest upon a disaffirmance of the contract before it was executed. It is essential to both classes that the contract be merely *malum prohibitum*.

If *malum in se*, the courts will in no case interfere to release either party from any of its consequences. But where the contract neither involves *moral turpitude* nor violates any *general* principle of public policy, and money or property has been advanced upon it, relief will be granted to the party making the advance: 1. Where he is not in *pari delicto*; or, 2. In some cases where he elects to disaffirm the contract while it remain *executory*.

The opinion then sets out what was said by Lord Mansfield, in the case of *Smith* v. *Bromley (Doug.*, 670, *note)*, to wit: "If the act is in itself *immoral*, or a violation of the *general laws of public policy*, then the party paying shall not have this action; for when both parties are equally criminal *against such general laws*, the rule is *potior est conditio defendentis*. But there are other laws which are calculated for the protection of the subjects against oppression, extortion, deceit, &c. *If such laws* are violated, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover; and it is astonishing that the reports do not distinguish between violations of the one and the other."

Upon this Judge Selden remarks: "Two things are to be noted in this extract; that a distinction is taken between contracts *malum prohibitum* merely and such as are immoral or contrary to general principles of policy; and, also, that stress is laid upon the fact that the law contravened *in this case* was intended to *protect one party from oppression by the other*." And the learned judge then adds: "The first is a valid distinction, which runs through *all* the subsequent cases; the *last* was merely incidental to the particular case *and not essential to the principle*." The opinion then proceeds: "The first cases in which *the principle* was applied, were naturally those where the statute violated was intended for the special protection of the party seeking relief from some undue advantage taken by the other; because those were the cases in which the injustice of applying the same rule to both parties would be the most glaring. *But it soon came to be seen that the principle was equally applicable to cases where the law infringed was intended for the protection of the public in general.*"

After reviewing several cases, which will presently be noticed, the learned judge says: "The rule laid down in those cases, *for determining which is the more guilty party*, is directly applicable to the present case,

so far as the transaction is held to fall within the provisions of the restraining act. It has been conceded, and was contended by the counsel for the receiver upon the argument, that the issuing of the certificates in this case was a violation of §§ 3, 6 and 7 of the act concerning unauthorized banking. (1 R. S., 712.) It will be seen, by referring to those sections, that the *penalties* are imposed *exclusively* upon the corporation violating the provisions of the act, and upon its officers and members. So far, therefore, as the defense is based upon a violation of the restraining act, there is that *statutory designation of the guilty party* upon which most of the cases to which I have referred are made to rest. But it is obvious that the *general principle* for which I contend applies equally to that branch of the defense which rests upon the ground that the act of the Banking Company in issuing the notes was *ultra vires and against public policy.* The imposition of the penalties, for a violation of the restraining law, upon the corporation *alone*, does not *make* it the guilty party, but is simply *evidence* that the legislature *so regarded it:* and the reasons are equally strong for fixing the principal guilt upon the same party, where its acts merely violate the principles of the public policy. Although persons dealing with corporations are, for certain purposes, *presumed* to know the extent of their corporate powers, yet this is by no means a safe rule by which to measure the moral delinquency of the respective parties."

"To me, therefore, it seems plain, that whether we regard the act of the *Trust and Banking Company*, in issuing the certificates in question, as a violation of the restraining law, or as simply *ultra vires*, or as against *public policy*, the corporation is to be regarded as comparatively *the guilty party.*"

These extracts indicate the grounds on which it was held that *The Morris Canal Company* had a good right of action against the *Trust and Banking Company* upon an *implied promise* to pay for the stock sold and delivered on this illegal contract. And we understand the opinion as maintaining: 1. That the restraining law proves, by imposing a penalty on the *Trust and Banking Company* alone, that it was "comparatively the guilty party," and, therefore, *The Morris Canal and Banking Company* not being in *pari delicto*, might recover; 2. That whether the sale was simply *ultra vires*, or positively *illegal*, *The Morris Canal Company* could not enforce the express contract, yet the law would

imply a promise in its favor to pay for the stocks sold, and on this a recovery might be had.

Judge Selden seems to hold that it is "*not essential to the principle*" on which relief may be granted to a party who violates a statute, that the statute should have been made for his protection; but in this, we think, with great respect, he is mistaken. If the violated statute has in view the promotion of sound public policy, all who voluntarily break it are *particeps criminis* and equally guilty, and it is only when the statute was made to protect one class against another, that the former can set up that they are not in *pari delicto*, and on that ground claim exemption from the ordinary consequences of their own acts. We cannot say, in the words of Judge Selden, that this is "*not essential to the principle*" on which a party may be relieved, for it is, as we understand the law, the very principle itself.

We now propose to show: 1. That the restraining law makes persons, natural or artificial, who *procure* paper to be issued in violation of its provisions, equally guilty with the corporation or individual issuing such paper; 2. That where a statue is violated by several persons, natural or artificial, neither can be relieved or aided on the ground that he is not *pari delicto*, unless the statute was made for his protection. *First*, as to the Restraining Law (1 *R. S.*, 712): The 3d section of this statute is as follows: "No incorporated company, without being authorized by law, shall employ any part of its effects, or be in any way interested in any fund that shall be employed, for the purpose of receiving deposits, making discounts, or issuing notes or other evidences of debt, to be loaned or put into circulation as money."

The 4th section is in these words: "Any *director or other agent or officer*, of any incorporated company, who shall violate any provision of the *last* section, shall forfeit one thousand dollars."

Here, it is plain, the penalty is imposed on directors and other agents or officers of incorporated companies only, and not on any other person who may be a party to the prohibited act; but the 7th section, under which the present question arises, is of a different character, and inflicts a penalty not only on those who violate the prohibitions in the 6th section, but also on all who "*assent* to such violation."

The 6th section declares that "No person, association of persons or body corporate, except such bodies corporate as are expressly authorized by law, shall

keep any office for the purpose of receiving deposits, or discounting notes or bills or issuing any evidences of debt, to be loaned or put in circulation as money, nor shall they issue any bills or promissory notes or other evidences of debt as private bankers, for the purpose of loaning them or putting them in circulation as money, unless thereto specially authorized by law."

The 7th section is, that "Every person and every corporation, and every member of a corporation, who shall contravene either of the provisions in the last section, or directly or indirectly, *assent* to such violation, shall forfeit one thousand dollars."

Now, without the slightest reference to these penal provisions, it must be illegal to do, or procure to be done, what is thus prohibited. It is a principle, not less of criminal than of civil law, that one who procures, by request or direction, an illegal act to be done, is himself a guilty violator of the law, precisely as much as the one who does the prohibited act. It might justly be deemed offensive, as implying gross ignorance on the part of the tribunal addressed, to cite authorities for a principle so plain and universal in its application, and none are referred to. If the penal sections were therefore expunged from the statute, the acts prohibited would be, when done, precisely as illegal as they now are; and to procure the issue of paper in violation of the provisions of the 6th section, would be exactly as illegal as actually to issue such paper. Penal sections add nothing to the illegality of what is prohibited, but only provide a mode of punishing guilty parties, some or all of them, in addition to the ordinary consequences of such acts. Where there is no express prohibition of an act, but a penalty is imposed for doing it, the penalty implies a prohibition; but if the statute contains a prohibitory as well as a penal clause, there is no occasion to look at the latter to determine that those who do, or aid in doing, what is prohibited, violate the law.

Thus, as to the restraining law, the issue of paper of a certain description being expressly prohibited by the 6th section, it must, on general principles, be illegal to procure such paper to be issued, whether the act imposes a penalty on such procurer or not. It seems to us, therefore, to be quite immaterial whether a penalty is incurred by procuring the issue of paper in violation of the restraining law or not, for the inquiry is, not whether a penalty is imposed on such

procurer, but whether it is illegal to procure such paper to be issued.

Still, we see no room to doubt that procuring the issue of such paper is a penal offence. The case falls within the 6th section of the restraining law, which, as we have seen, declares amongst other things, that "no person, association of persons, or body politic, except," &c., "shall issue any bills or promissory notes, or other evidence of debt as private bankers, for the purpose," &c. Then follows § 7, which declares that "*every person* and every *corporation*, and every *member* or a corporation, who shall *contravene* either of the provisions in the last section, or *directly* or *indirectly assent* to such violation, shall forfeit one thousand dollars."

One who does the act of issuing paper in violation of the 6th section, "*contravenes*" what is prohibited; and one who procures such paper to be issued for his own use certainly assents to such violation, and therefore incurs the penalty imposed by the 7th section. By this section, a penalty may be incurred not only by contravening the 6th section, but by assenting thereto, and the persons who may thus violate the law are not merely the corporation and its members, but "*every*" other person. What then is there in the restraining law to show that the party who issues illegal paper is more guilty than one who procures it to be issued? And in reason, why should he be?

The rule laid down in the opinion, that the imposition of a penalty on one of the parties only to an illegal act marks the offender, and shows that the other is not in *pari delicto*, if there be such a rule, can have no application to the 7th section of the restraining law, for by that the penalty is imposed alike on each party. That one who procures paper to be issued in violation of that law is in equal guilt with the corporation issuing such paper, was expressly held by Judge DENIO, in the case of *Schermerhorn* v. *The American Life Ins. and Trust Co.*, decided by this court in March, 1856.

The case of *De Groot* v. *Van Duzer* (20 *Wend.*, 390) goes even beyond this in support of the principle for which we contend. There it was held by the court of last resort, that Van Duzer could not recover on a contract made to facilitate a violation of the 6th section of the restraining law by a foreign bank, though he had not dealt directly with the bank, but with a party still more remote from the statute prohibition. The case

proves that both parties were guilty violators of the prohibition, and it cannot stand if the rule adopted by Judge SELDEN is maintained.

The rule, moreover, stands in direct opposition to the case of *Leavitt* v. *Palmer* (3 *Comst.*, 19), decided by this court. In that case, a trust was created by the *North American Trust and Banking Company*, to secure the payment of certain promissory notes issued by it in November, 1840, to the Palmers of London. The bill was filed in that case by the receiver of the company, to set aside this trust as illegal, and to compel the Palmers to account for what they had received under it. It was held by the court of appeals, that the trust was illegal and void, because made to secure notes issued in violation of the act of May 14, 1840, and the Palmers were required by the judgment to account for and pay over to the receiver what they had received under the trust. The act which made these notes, and consequently the trust to secure them, illegal (*Laws of* 1840, 306, § 4), prohibits the issue of such paper by banking associations or individual bankers, as such, and declares that "every violation of this section by any officer or member of a banking association, or by an individual banker, shall be deemed and adjudged a misdemeanor, punishable by fine or imprisonment, or both." No penalty, it will be observed, is imposed on the person who procures the illegal paper to be issued; yet the court held as to the Palmers—for whose benefit the notes were made—as well as against the bank, that the notes and trust were illegal, and required the Palmers to account for what they had received under the trust towards payment of the notes. They were not allowed to retain what had been paid to them, on the ground that the statute, by making the issue of such notes a misdemeanor on the part of the officers and members of the bank, had marked them as the principal offenders, and left the Palmers, who had procured the issue of the illegal paper for their benefit, wholly unaffected by this violation of the statute. According to the opinion of Judge Selden, the Palmers were not in *pari delicto* with the bank, but the court were of a different opinion in that case, and held the notes and trust illegal, not only as to the bank, but also as to the Palmers, and compelled them to refund what had been paid over to them under the trust.

But we proceed to our second point, stated above, which is: that where a statute is violated, no one who is a violator can be relieved or aided, on the ground

that he is not in *pari delicto*, unless the statute was made for his protection. If the rule is thus limited, as we supposed it is, it can have no application to this case: nor will the imposition of a penalty on one party alone show that he is the greater offender.

It is possible that a statute, with or without a penalty, may be framed so as to declare in terms, or effect, that one of two parties to an act, which it prohibits, is alone guilty; though instances of this nature must be rare, especially as to statutes passed for the benefit of the public in general. Such a statute must be regarded as an anomaly in legislation; for while it prohibits the doing of an act, because contrary to the public interest, it tenders absolute immunity to all who cause it to be done. Nay, it goes further. It encourages persons to cause the act to be done, by declaring them innocent, and telling them that though they may not gain by their conduct they shall in no event lose by it. Still, we admit the legislature have power to do this; and the question is, whether they have exercised it by the statutes on which we rely.

It was insisted on the argument of the case in which the opinion of Judge Selden was given, that the contract in question, in that case, was illegal on several grounds; and, amongst others, the following, to wit: 1. Because the certificates, agreed by said contract to be received for the stocks sold, would be, and were when issued, a violation of the restraining law (1 *R. S.*, 612); 2. That said certificates were, as to the *Trust and Banking Company, ultra vires*, and therefore illegal; 3. That, being *ultra vires*, the certificates were expressly prohibited by 1 *R. S.*, 600, § 3; 4. That they were also prohibited by the safety fund act of 1829. (*Laws of* 1829, 167, §§ 1, 35.)

It is obvious that these statutes were passed for public purposes and objects, if any statutes ever were, and not with a view to the protection of any particular class of persons against others; and, therefore, acts in contravention of them can on no principle be held illegal as to one party and legal as to the other.

We will now examine the cases referred to by Judge Selden, to maintain his opinion on the point under consideration; but which, as we understand them, do not sustain that opinion. Indeed, as we read these cases, they show conclusively that where two persons concur in the violation of a statute, neither can have relief as against the other, where the statute does not in terms authorize such relief; unless the statute vio-

lated was designed for the protection of the one seeking relief as against the other. We do not, of course refer to instances where a party is compelled, by positive force, to do an act which violates the law, but to those where there is a moral coercion; as in agreeing to pay usury, which the statute for this purpose regards as equivalent to coercion by absolute force.

The first of these cases is *Jaques* v. *Golightly* (2 *Wm. Bl.*, 1073), which was decided by the English court of common pleas, in 1776. The Reports of Sir William Blackstone were published from his notes of cases in 1781, after his decease. They are, in general, but meager statements of facts and reasons, and the report of this case is by no means an exception. The case was this; It was an action to recover money which the plaintiff had paid to the defendant for insuring lottery tickets; and, also, money won by the plaintiff on the contract of insurance, some of said tickets having been successful. The insurance of lottery tickets was forbidden by act of parliament. The court held that the plaintiff could not recover on the contract of insurance, as that was illegal, but that he could recover the amount paid by way of premium for making the insurance. Judge Selden understands this case to have been decided on the ground that the statute which prohibited these insurance contracts imposed a penalty on the insurer only; from which he deduces the principle that where a penalty is imposed on one party alone, the other is not in *pari delicto* with him. The report of Sir William Blackstone does not show very plainly the principle on which the case was decided; although, in giving his own opinion (for he was one of the judges), he glanced at it, in his remark that "on the part of the insured, the contract on which he has paid his money is not criminal, but merely void; and, therefore, having advanced his premium without any consideration, he is entitled to recover it back." This is well enough as far as it goes, but still it does not explain why the contract was not criminal on the part of the insured as well as the insurer; nor can that be clearly ascertained from any part of the report of the case. Fortunately, however, there is no doubt on the point, if we can rely on what was said by Lord Mansfield, in 1778, two years after the case of *Jaques* v. *Golightly* had been decided. In giving judgment in that year, in the case of *Browning* v. *Morris* (*Cowp.*, 793), Lord Mansfield said: "This brings the

present case within the determination of *Jaques* v. *Golightly*. For in that case the chief justice said: '*The statute is made to protect* the ignorant and deluded multitudes, who, in hopes of gaining prizes, and not conversant in calculations, *are drawn in by the office keepers.*'" This cannot be mistaken; it shows plainly why the advance of money on the contract was not criminal on the part of the insured; for the statute was made to protect him from being imposed upon by the insurer. The case has ever since been regarded as an authority for this principle, and for nothing else.

Judge Sheldon refers to *Jaques* v. *Withy* (1 *Hen. Bl.*, 65), decided by the English common pleas, in 1788. It was an action brought to recover back money paid for insuring lottery tickets; was argued, on the ground that the statute was made to protect the assured, and, therefore, he was not in *pari delicto* with the insurer. The court so held, and the plaintiff recovered. Judge Selden says that this, and *Jaques* v. *Golightly*, are not cases, where an "*undue advantage* was taken of the peculiar situation of the" plaintiffs. But Lord Ellenborough thought otherwise, for in *Thistlewood* v. *Cracroft* (1 *Maule & Selw.*, 500), decided in 1813, in speaking of these cases he remarked: "The statute was considered as intended to *protect* the individual, and to mark the lottery office keeper as *stigmatious*, the one being likely to be oppressed or imposed upon by the other; *and on that view of the statute those decisions turned.*"

The case of *Williams* v. *Hedley* (8 *East*, 378) is referred to by Judge Selden. The defendant, Hedley, had previously brought a *qui tam* action for usury against the plaintiff, Williams, which they agreed to compromise and settle, Williams paying, to effect that object, a large sum of money. He brought this action to recover that money back, and it was objected that he was a *particeps criminis* in *pari delicto*, with the defendant Hedley, in making the compromise, and, therefore, could not recover. But the court held that the statute which prohibited the compromise of penal actions, was confined to the informer or plaintiff therein, and did not extend to the defendant; that it was meant to restrain and punish the one who sues, who might do so in order to extort money, and not the party who might be the object of such extortion. This, Lord Ellenborough said, "appears to have been the true sense and intention of the legislature." In answer to the objection, that although the defendant in

the penal suit might not be within the terms of the statute, yet he concurred in and was a party to the act by which the statute was violated, and that the law would not aid him, Lord Ellenborough observed, that this rule applies, "if the act be in itself immoral, or a violation of the general laws of public policy; yet in the case of other laws, *which are calculated for the protection of the subject against oppression, extortion* and *deceit*, Lord Mansfield lays down, that if *such laws* be violated, and the defendant take advantage of the plaintiff's condition or situation, then the plaintiff shall recover." And in applying this principle to the case before the court, Lord Ellenborough said: "In respect to the criminal offence of compounding, the plaintiff, Williams, was the person *whose situation was taken advantage of by the other party to the composition;* the provision of law was made to *protect* parties in the condition of Williams, and he can recover."

Judge Selden says: "These are the leading English cases on the subject; and it is plain that they do not rest solely upon the ground that the statute infringed was intended to protect one party from acts of oppression or extortion by the other." We cannot see this as his Honor does, for we understand these cases as resting "*solely*" on the ground just stated. Indeed, where two persons voluntarily concur in an act which violates a statute, why are they not in *pari delicto*, unless the statute was intended to protect one as against the other?

We agree with Judge Selden that these cases have never been overruled, and that, as we understand them, they have been expressly sanctioned and approved by American cases. *The Inhabitants of Worcester* v. *Eaton* (11 *Mass.*, 368) is such a case.

Judge Selden mentions the case of *White* v. *Franklin Bank* (22 *Pick.*, 181), and says: "It is impossible, as it seems to me, to distinguish this case in principle from that now before the court." Again, "it belongs clearly to the same class with the English cases just reviewed."

Let us see what this case was. It was an action brought on the 7th of July, 1837, to recover $2000, deposited by the plaintiff with the defendant on the 10th of February in that year, and for which the defendant gave a written agreement to repay the money on the 10th of August then next. A statute of Massachusetts prohibited banks from making any contract "for the payment of money at a future day

certain," under penalty of a forfeiture of their charter. It was objected that the plaintiff having advanced the money upon an illegal contract, could not recover it back.

There is one feature of this case which alone ought to detract from its weight as an authority. The court were evidently unable to find a precise principle on which to place their decision, and therefore adverted to various grounds. Among these are the following: 1. That the statute treated the act of deposit as perfectly legal, and only prohibited the issuing of the certificate by the bank (22 *Pick.*, 183, *Shaw, Ch. J.; id.*, 185, *Wilde, J.)* 2. That therefore its prohibitions were leveled particularly against the bank, and the act of the depositor was not prohibited (22 *Pick.*, 188). 3. That as the contract was *malum prohibitum* merely, not *malum in se*, the depositor might recover. (22 *Pick.*, 185.) Another view was adverted to, viz., that the contract remained executory, and the depositor, even if guilty, was entitled to his *locus penitentiæ* and to sue in disaffirmance. But the court finally declined to place their decision on this ground, and expressly disclaimed it. (22 *Pick.*, 189, 190.)

It is manifest, therefore, in disposing of the case, the court reposed themselves mainly, if not entirely, upon the interpretation of the statute, which they understood to mean that the act of the depositor in contracting for and taking the certificate was in no sense illegal, though the bank was prohibited from giving it. If the statute said this, or if such was its true meaning, the decision does not stand in our way. And if the court erred in the construction of the statute, the result is the same. But if the decision is understood as affirming, that where a statute is passed for public purposes and objects, persons may lawfully tempt others to violate it, simply because its penalty is imposed on the latter alone, it is directly contrary to the general rule established by numerous cases, and by this court in the case of *Leavitt* v. *Palmer*.

The case of *Atlas Bank* v. *Nahant Bank* (3 *Metc.*, 581) is precisely like the one last above, and calls for no further notice.

The case of *Lowell* v. *Boston and Lowell Railroad Company* (23 *Pick.*, 24) is also one of the cases referred to by Judge Selden. It was the duty of the plaintiff (the town of Lowell) to keep a highway in repair, so as not to be dangerous to those who might have occasion to use it. The plaintiff had caused proper barriers for

this purpose to be placed in the highway, but they were removed by the defendants, in consequence of which two persons were injured, who sued and recovered damages of the plaintiff. Upon these facts it was very properly held, that the plaintiff, not being in *pari delicto* with the defendants, might recover the damages thus sustained by the town.

The only other case referred to by Judge Selden, on this subject, is *Mount* v. *White* (7 *John.*, 434), which was precisely like the cases of *Jaques* v. *Golightly*, and *Jaques* v. *Withy*, and was decided, as they were, on the ground that the statute was intended to protect the plaintiff.

We here close our review of the opinion of the court, and we must say we are wholly unable to perceive that cases founded on statutes made for the protection of one class of persons against the fraud, oppression or chicanery of another, have any application to such a case as the one on which that opinion was given; or that they tend to prove The Morris Canal Company not to have been in *pari delicto* with the Trust and Banking Company.

Our object has been to show, and, with great respect, we think we have shown, that the opinion is erroneous in these particulars: 1. In holding that a sale of personal property is legal, although the seller has notice that the purchase is made with intent to make any illegal use of the property; and that the sale is illegal only when it is made a part of the contract that the property shall be applied to an illegal purpose; 2. In holding that the 7th section of the restraining law does not inflict a penalty on those who procure paper to be issued in violation of the 6th section, but only on the party who actually issues such paper; 3. In holding that the imposition of a penalty, on part only of those who violate a statute, makes or proves those who are subject to the penalty greater offenders than the others, and that the latter, although themselves guilty violators of the law, may have redress against the former; 4. In holding that the Morris Canal and Banking Company was not, in the illegal sale and delivery of state stocks to the North American Trust and Banking Company, in *pari delicto* with the latter.

A. Mann argued the motion for the State of Indiana.

COMSTOCK, J. This case having been decided at the last June term, the defendants' counsel now move for a

rehearing, alleging that the court, through a misapprehension of the authorities cited in the opinion of Judge Selden, has fallen into manifest error in its decision. A review of that decision is therefore urged, not only as an act of justice to the parties, but also from a very commendable regard for the law itself. In the variety and multiplicity of questions which engage the attention of this court, many of them difficult and complicated, it can hardly fail to happen that inadvertence and misapprehension will sometimes occur. When such is the case, it is plainly the duty, as, I doubt not, it will always be the pleasure, of the court to retrace its steps and correct the errors it may have committed, so long as the questions decided are open for consideration.

In the opinion of Judge Selden, which received our assent when the judgment was pronounced, the doctrine is laid down, that in an action to recover the price of goods sold, it is no defence that the vendor knew that they were bought for an illegal purpose, **provided it was not made a part of the contract that they should be used for that purpose, and provided also, that the vendor had done nothing in aid or furtherance of the unlawful design beyond the mere sale with knowledge of the intent of the purchaser.** In the elaborate criticism of the defendant's counsel upon this doctrine, it is insisted that the authorities cited to sustain it, instead of establishing a general principle, are mere exceptions, depending on the nature of the laws violated and the circumstances under which the contracts of sale were made. It becomes proper, therefore, to analyze these authorities, at least the leading ones, with more care than was deemed necessary on the former occasion.

The leading case, in England, is that of *Holman* v. *Johnson* (*Cowp.*, 341). In that case the contract of sale was made in France, by a citizen residing there. The purchaser intended to smuggle the goods into England, in violation of the revenue laws of that

kingdom; but, as the case states, "the seller had no concern in the smuggling scheme itself, but merely sold the tea to the defendant, as he would have done to any other person in the common and ordinary course of trade." In deciding the case, Lord Mansfield referred to the circumstances of the contract being made abroad, as of some importance; but the reason why he so regarded it, has, I think, been misunderstood in some of the later cases, as well as by the counsel for the receiver in the one now under consideration. Goods smuggled into England could not be sold at all. So I infer from the remarks of Lord Mansfield. He said: "In England, tea which has not paid duty, is prohibited, and if sold there the contract *is null and void;* but if sold and delivered at a place where it is not prohibited, as at Dunkirk, and an action is brought for the price of it in England, the buyer should be condemned to pay the price, because the original contract was good and valid." To maintain the action, it was indispensable to show that the goods could be the subject of a lawful sale between the parties; but as they had not paid duty, they could only be lawfully sold out of England. The situation of the goods and the place of the contract were therefore important, but only to establish the general legality of the transaction. That being settled, the turning point of the case was, that the plaintiff, although he knew of the purchaser's intention to smuggle the tea into England, did nothing either in the terms of the contract or otherwise in furtherance of that intent. This is quite evident from the following language of the lord chief justice: "Is there any law of England," he inquired, "transgressed by a person making a complete sale of a parcel of goods at Dunkirk and giving credit for them? The contract is *complete*, and nothing is left to be done. The seller, indeed, knows what the buyer is going to do with the goods, *but has no concern in the transaction itself.* It is not a bargain to be paid in case the vendee should succeed in landing the goods, but the interest of the vendor is

totally at an end, and his contract complete by the delivery of the goods at Dunkirk."

I am greatly mistaken if this reasoning does not rest entirely upon the fact that the contract of sale had no connection with the subsequent destination of the goods. Its force is not in the least degree impaired, if the words "at Dunkirk" are expunged from the passage quoted. To apply the argument to the facts of the present case: it was lawful, in general, for The Morris Canal and Banking Company to sell Indiana state stocks to the North American Trust and Banking Company, although unlawful for the latter to use the stocks in a particular way. With the unauthorized or illegal design, the Morris Company had nothing to do. The sale itself was complete, irrespective of that design, and the transaction between the parties closed. I have no hesitation in saying, that the case of *Holman* v. *Johnson* has not been misapprehended, and that the present one falls precisely within the doctrine there laid down.

In the case of *Biggs* v. *Lawrence*, (3 *Term R.*, 454), the plaintiffs were four partners, three of whom resided in England, and one in Guernsey. The action was for goods sold in Guernsey, to be smuggled. It was admitted that the question must be considered as though all the plaintiffs had resided in England. In determining that the action would not lie, some of the judges thought that circumstances important, as distinguishing the case from *Holman* v. *Johnson*, evidently misapprehending the reasoning of Lord Mansfield; but they all laid peculiar stress upon the manner in which the goods were packed, evincing a design, as was said, on the part of the sellers, to aid the buyer in smuggling them into England. Ashhurst, J., observed, "the plaintiffs were agents in the *very act of smuggling*." Buller, J. said, "it is clear, from the manner in which they were packed, that they were intended to be smuggled; *that was the act of the plaintiff*." The case, in short, clearly recognizes the distinction between mere knowledge, on the part of the vendor, of

the illegal intent of the purchaser, and the doing of some act to further that intent.

The subsequent cases of *Clugas* v. *Penaluna* (4 *Term*, 466), and *Waymell* v. *Reed* (5 *id.*, 599), still more clearly recognize the same distinction, and in them the distinction is not obscured by any misapprehension of the decision of Lord Mansfield. In both those cases, that decision was regarded as proceeding on the ground merely that the sale itself being a lawful contract, mere knowledge of the buyer's intention to smuggle the goods did not prevent a recovery of the price. But there is a further significance in these two cases. They necessarily repudiate the notion that the foreign residence of the seller or the place of the contract has anything to do with the question. In one of them (*Clugas* v. *Penaluna*), the vendor resided in Guernsey, and was not affected by the revenue laws of England, and on that ground it was sought to distinguish the case from *Biggs* v. *Lawrence* (*supra*). In the other (*Waymell* v. *Reed*), the vendor was for a foreigner residing at Lisle. In both the cases, it was held the plaintiff could not recover the price of the goods, because, in addition to the mere sale, with the knowledge of the intent to smuggle, they had done some act to aid in the execution of that intent. Now, if the foreign residence of the vendor, or the place of the contract, or even the character of the laws infringed, as mere revenue statutes, were the turning point in cases of this description, it is entirely plain that the actions would have been sustained; for in one the case, the inhabitant of Guernsey, although a subject of England, was not reached by its statutes against smuggling, while, in the other, the plaintiff was a resident of France; in both, the contracts of sale were lawful at the place where they were made, and in both the laws intended to be violated by the purchaser were revenue laws merely. These distinctions were therefore emphatically repudiated, while that of Lord Mansfield, in *Holman* v. *Johnson*, was distinctly recognized and admitted.

The next case in the series is that of *Hodgson* v. *Temple* (5 *Taunt.*, 181), where the goods were sold, and the plaintiff resided in London. It became, therefore, necessary to look at the question divested of the extraneous circumstances which had attended the previous cases, and the main point now in controversy was met and decided in terms as explicit as the English language affords. The court in that case ceased to advert to the distinctions between contracts made abroad and in England, and between a design to violate a revenue law and any other law, but asserted broadly the doctrine we held in the present case, that mere knowledge on the part of the vendor of goods, that the buyer intends to use them for an illegal purpose, will not defeat a recovery for the purchase money. The effort which has been made to escape the force of this decision, by putting it on some other ground, has been quite unsuccessful.

The latest of the English cases cited by Judge Selden is *Pellicatt* v. *Angel* (2 *Cromp., Mees. & Ros.*, 311). Although in this case, as in that of *Holman* v. *Johnson*, the sale of the goods was made in France by a foreigner residing there, and although this circumstance is alluded to by the chief baron, it was not the ground of the decision. Lord Abinger said: "The plaintiff sold the goods; the defendant might smuggle them if he liked, or he might change his mind the next day; it does not at all import a contract, of which the smuggling was to be an essential part." Baron Bolland said: "I think the distinction pointed out by the chief baron, between merely knowing of the illegal purpose, and being a party to it by some act, is the true one;" and Alderson, B., said: "The mere sale to a party, although he may intend to commit an illegal act, is no breach of the law." These remarks clearly had no reference to the nature of the law intended to be violated, or to the place of the contract. They are unintelligible, unless they assert the doctrine we have laid down in this case.

It will, perhaps, be still more apparent that we have

not misapprehended these authorities, if we now refer to one or two others not cited on the previous occasion. In *Bowry* v. *Bennett* (1 *Campb.*, 348), the action was brought to recover the price of certain clothes sold to the defendant, and the defence was that the defendant was a woman of the town; that this was well known to the plaintiff, and that the clothes were purchased to enable the defendant to carry on the business of prostitution. Lord Ellenborough held, at *nisi prius*, that "it must be shown not only that the plaintiff had notice, but that he expected to be paid from the profits of the defendant's prostitution, and that he sold the clothes to enable her to carry it on, *so that he might appear to have done something in furtherance of it.*" It would be difficult to distinguish the principle here enunciated from that adopted by this court.

The precise question under consideration has arisen and been determined in the same way by one of the American courts, whose decisions are entitled to no inconsiderable weight. In the case of *Cheeney* v. *Duke* (10 *Gill & John.*, 11), the action was assumpsit, to recover the price of a slave sold by the plaintiff to the defendant. It appeared that the defendant purchased the slave with intent to remove him beyond the limits of the State of Maryland, contrary to the provisions of a statute of that state, and that this was known to the plaintiff. The Maryland court of appeals held this no defence. The authorities referred to were the same that we have cited, and they were understood as we understand them; not as exceptional cases, but as establishing a rule of decision.

We have then, I think, a very imposing array of authorities, in all of which the doctrine we have laid down was either expressly adjudged or explicitly recognized. Opposed to this doctrine, in England, stands the case of *Langton* v. *Hughes* (1 *Maule & Selw.*, 593), and, in this country, the case of *Territt* v. *Bartlett* (21 *Verm.*, 184). These cases may be regarded as breaking the uniformity of the rule; but to say that they

overcome it, or establish an opposite one, would be allowing them an importance to which they are not justly entitled; I do not pause to bestow on them any special criticism.

In addition to these two cases, which are admitted to bear with considerable directness upon the question, the defendant's counsel have cited *Lighfoot* v. *Tenant* (1 *Bos. & Pul.*, 551); *Cannan* v. *Bryce* (3 *Barn. & Ald.*, 179); *McKormel* v. *Robinson* (3 *Mees. & Wels.*, 434); *The Gas Light Company* v. *Turner* (5 *Bing., N. C.*, 666); and *S. C.* (6 *id.*, 314); *Peck* v. *Riggs* (3 *Denio*, 107); *Ruckman* v. *Bryan* (*id.*, 340); and *White* v. *Buss* (3 *Cushing*, 448). I mention these, because, although others were cited also, they are too remote to require any particular notice. I group these cases together because they do not differ essentially in principle. Some of them sustain the position that if the vendor of goods or the lender of money can be connected in intention with the illegal purpose to which the goods or money is to be applied, it is enough to defeat this action, although the unlawful use is not specified in the contract, and although he does not act in furtherance of the design beyond the sale or loan. But further than this they do not go. *There is certainly room for a distinction between a case where the seller or lender simply knows of the illegal design, and one where he advances the money or the goods for the express purpose of enabling the other party to effectuate such design.* For illustration, money may be lent in a gambling house, for the specific purpose of staking it on the result of a game. The law says it cannot be recovered. But suppose a broker or a banker lends money in his office in the regular course of his business, knowing his customer to be a gambler by habit, and believing that he wants the loan for gaming purposes. If the illegal design does not enter at all into the negotiation of the contract, if it forms no part of the inducement to the transaction, will the knowledge or belief of the lender (and knowledge and belief for the purposes of this question are the same) prevent

him from recovering the money when it is due? Such a doctrine, I apprehend, would be highly inconvenient in a commercial community like this. It would exact a more frequent scrutiny on the part of dealers into the habits and designs of others, than the law requires any man to make.

I deem it unnecessary to go into a more particular analysis of the cases last referred to. The leading ones were cited and commented upon by Judge Selden, and we see no reason to think that they have been misapprehended.

And upon this review of all the authorities cited, although there is not entire uniformity, we think it safe to assert that they preponderate decidedly in favor of that view of the question which we adopted in deciding this case. But if the doctrine were more doubtful upon authority than we believe it is, we are constrained to say that we approve it as founded in reason and justice when applied in cases like the present. The principle should perhaps, be stated, with some qualifications not suggested in the former opinion of the court. The case may be put of poison, or a deadly weapon purchased for the purpose of murder. The offense intended may be of such enormity, that no man having a knowledge of the design can remain neutral without being in a just sense a criminal himself. Where the design is to violate the fundamental laws of society, a positive duty of intervention may arise to prevent the perpetration of the crime. To such cases, the rule which we laid down ought not to be applied. But if the question should ever be thoroughly examined, it will, I think, be found to have been far too broadly asserted in respect to illegal contracts, that the law does not distinguish between acts criminal in their essential nature, and those which are wrong, only because they are prohibited. *This distinction cannot be made where the contract itself is prohibited, and the question is directly upon its validity.* The inquiry, then, depends not so much upon the ethics as the

logic of the law, which cannot both affirm and prohibit the same contract. But in respect to many incidental questions, the moral feeling and common sense of every man does discriminate, and so I apprehend does the law.

Let us look at the facts of this case on which the question turns. The sale of the Indiana state stocks was in itself a lawful and innocent contract. One of the parties had them for sale, and sold them in the regular course of its business. The other was competent to buy them for authorized and legitimate purposes. But it is said the seller knew the buyer's design to use them for a purpose, not in itself immoral or wrong, but unlawful only because not within its corporate powers. That purpose might have been strictly a religious or charitable one, but still unauthorized. Of this knowledge there is no direct evidence, and it has therefore been insisted that the surrounding circumstances were sufficient to put the vendor upon inquiry, amounting, constructively, at least, to notice of the facts. This may be granted; and it is also true that such a notice will determine many questions of mere title between parties affected by it and others who have a prior or more meritorious claim to the consideration of courts. But was the doctrine ever applied to a case like this? The sale itself being a lawful commercial transaction, and even the ultimate purpose of the vendee to exceed its corporate powers, involving nothing in itself immoral or wrong, where, it may well be asked, is the moral guilt of the vendor, which should be visited with a positive penalty far exceeding in pecuniary amount any known to our criminal jurisprudence? The discriminations which have been suggested may sometimes be difficult to make but courts must make them, or the law becomes an instrument of the most absurd injustice. The difficulty does not exist in the present case.

The second ground of defence to the claim under consideration was, that the contract for the sale of the state stocks provided for receiving in payment the

negotiable promissory notes of the North American Trust and Banking Company, on time, and was on that ground illegal and void. We are asked to review our conclusions on this branch of the case also, and we have done so.

If the certificates or post notes of the Trust and Banking Company were issued for "the purpose of loaning them or putting them in circulation as money," they were not authorized by the general banking law of 1838, because the issuing power under that act is confined to notes payable on demand, countersigned and registered in the controller's office, and secured in the manner provided. As a consequence of not being authorized, they were expressly forbidden by the restraining act of 1830, which applies, and is now in force as to all "persons, associations of persons, and bodies corporate not expressly authorized by law." (1 *R. S.*, 712, § 6; *Chancellor Walworth in Safford* v. *Wykoff*, 4 *Hill*, 444.) Viewed in this light, therefore, the act of issuing these notes was (first) *ultra vires*, or beyond the corporate power of the Trust and Banking company, and (second) forbidden under the penalties of the restraining law, the penalties being a forfeiture of $1000 by every person or corporation violating the prohibition, or "assenting" to such violation. In deciding this case, we assumed that the post notes were void, but held that the claimant was entitled to disaffirm the contract, and recover the value of the state stocks for the price for which the notes were given. This position we are constrained to adhere to, after an attentive reconsideration.

It may well be conceded, that a contract entered into by the agents of a corporation, which, either in substance or form, transcends its powers, creates no legal obligation, and cannot be enforced. But it is one thing to say that a void or forbidden contract cannot be enforced, and quite another to hold that both the parties are involved in moral guilt, so that neither can disaffirm it, and recover upon an implied assumpsit the money or value which he has advanced. A general

distinction of this kind has been universally recognized, although the cases do not all agree as to the conditions under which it is to be applied. It is enough that the distinction itself is well settled, for we are satisfied that it has not been misapplied in the present case.

The maxim "*in pari delicto potior est conditio defendentis*" has never been applied to the case of a person contracting with a corporation, simply beyond the powers of the latter. To this remark the cases of the *East Anglian Railway Company* v. *Eastern Counties Railroad Company* (7 *Eng. Law and Eq. R.*, 505); *McGregor* v. *Manager Deal and Dover Railroad Company* (16 *id.*, 180); and *The Mayor of Norfolk* v. *The Norfolk Railroad Company* (30 *id.*, 120) form no exception. In all these cases the action was founded upon, and affirmed the unauthorized contract, and in none of them was the maxim quoted, or the reason of policy on which it is founded so much as alluded to. Indeed, the maxim can very rarely be used in such a case without a total perversion of its original design. An instance might, no doubt, occur where the person dealing with a corporation might be shown to be an active and contriving agent in the unauthorized transaction. Then the law might leave him where it found him. It is not necessary to deny that the Morris Company might have received the post notes in such complicity with the company that issued them as to be an equal sharer in the violation of law. It might possibly be true, that the sale of the Indiana stocks was contrived for the very purpose of getting possession of the notes, in order to put them in circulation, contrary to the laws and policy of the State of New York. But such was not in fact the transaction. The Morris Company had the state stocks, which it wished to sell, and the Trust and Banking Company wished to buy them, but wanted credit for the purchase money. This was agreed to, and the notes were given as the evidence of the debt. That was the whole transaction. The sale itself, as

we have seen, being lawful, it is not doubted that a security for the price might be given in some form free from objection. In the particular form of a negotiable instrument, it is said they were illegal and void. It may be so, but the only necessary consequence is, that the creditor received a worthless security. It by no means follows that the vendor of the stocks was guilty of such moral delinquency as to involve a total forfeiture of the article sold. It is admitted that the contract of a corporation, which it has no legal capacity to make, cannot in its terms be enforced. But does it follow that the alleged transgressor may appropriate, without compensation, the money, the goods or the services of the person with whom it deals? There are, no doubt, authorities upon the general question, which cannot be reconciled, but it is safe to say that such a rule as this has never been established.

The same considerations apply, if we regard the post notes as issued in violation of the express provisions of the restraining law. The prohibition is, upon the person, association or corporation which issues a paper, and not upon the more unfortunate recipient. The penalty, it is true, is imposed in broad language upon "every person and corporation, and every member of a corporation, violating the provision or assenting to such violation;" but this does not, upon any fair and reasonable construction, include a stranger who deals with the offending person or corporation. In the language, then, of Lord Mansfield (*Browning* v. *Morris*, *Cowp.*, 790), "the statute itself has marked the criminal." The counsel for the defendant have denied there is any distinction founded on this circumstance. It cannot be denied, however, that there are cases both in England and in this country, where the distinction has been recognized, nor that it has the sanction of very eminent names, such as Mansfield, Sir William Blackstone, Chancellor Kent, and Chief Justice Parker. It has never been in terms repudiated in any case entitled to weight as authority,

and we think it a sound and reasonable distinction where the act prohibited involves in itself no moral turpitude, and would be innocent if not forbidden. Without going over the cases at large, we see no reason to change the views upon this question which we entertained when the case was decided.

In determining the case upon these principles, we necessarily assumed that the certificates or post notes were void, either as issued by the corporation *ultra vires*, or as falling under the prohibitions of the restraining act. This was assumed without special examination, because we felt less difficulty in disposing of the case in the manner we did, than it was supposed we might encounter in affirming the validity of the notes. If we had held them valid, the result would have been a simple affirmance of the judgment of the supreme court. It is proper, and perhaps necessary, now to say, that we did not and do not now intend to pass definitely upon that question. The respondents, however, do not ask a reargument, and the appellant has no right to ask one for the purpose of having the validity of the notes established, and the judgment thus affirmed, instead of modified, as it now is.

The motion must be denied.

All the judges, except A. S. JOHNSON, J., who took no part, were in favor of denying the motion; and all the Judges, except DENIO, Ch. J., and A. S. JOHNSON, J., concurred that mere knowledge by the vendor, that the vendee at the time of the purchase of property, intends to use it for an illegal purpose, will not prevent the vendor from recovering from the vendee the value of the property.

Motion denied.

[114 N. Y. 371.]

1889.

William D. Leonard, as Receiver, Appellant, v. Abram Poole, Impleaded, etc., Respondent.

Where a number of persons and firms have conspired together, in violation of the statutes (2 R. S. 692, § 8, sub. 6 ; Penal Code, § 168), to do acts injurious to trade, for instance, to unlawfully advance the price of an article of food, the courts will not intervene in favor of any one of the parties to give him redress for frauds perpetrated by another to his detriment in carrying out the unlawful enterprise.

It does not affect the question that the party complained of as guilty of the fraud was acting as agent for the others. All those who knowingly promote and participate in carrying out a criminal scheme are principals, and the fact that one acts, in some respects in subordination to the others, does not render him less a principal.

Where, therefore, a broker, who was one of the parties to an unlawful scheme to advance the price of lard, but who acted in carrying out the scheme, simply as agent for the others, was proved to have defrauded his principals, *held*, that an action to compel him to account was not maintainable ; that the courts would not aid in adjusting differences arising out of and requiring an investigation of the illegal transactions.

Reported below 23 J. & S. 213.

(Argued March 28, 1889 ; decided June 4, 1889.)

FOLLETT, Ch. J. When the transactions out of which this action arose were being carried on the statutes of this state provided that if two or more persons conspire to commit any act injurious to trade or commerce, each of them is guilty of a misdemeanor. (2 R. S. 692, § 8, subd. 6.) The same provision is contained in the Penal Code, section 168. The scheme entered into by the parties to the contract of August 13, 1879, was an indictable misdemeanor. (2 R. S. 692, § 8 ; *People v.*

Fisher, 14 Wend. 9; *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 *Id.* 434; *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y., 558, 565; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173). The scheme which the parties to the contract for a time pursued, and sought to consummate, was identical with the one described in the contract, and equally criminal. That Keene, Washington Butcher's Sons and D. & N. G. Miller agreed to engage, and actually engaged, in an unlawful plot to advance the price of lard cannot be successfully denied, and the courts of this state will not entertain an action to adjust their differences. This proposition is well settled; and we do not understand that the learned counsel for the appellant gainsays it, nor does he assert that the rule would not be applicable to a case arising between those parties and out of these transactions. The learned counsel for the appellant insists that Kent & Co. were not principals, but were mere agents for the principals, and that they cannot avoid payment upon the ground that the transactions were illegal. When persons knowingly promote and participate in carrying out a criminal scheme they are all principals, and the fact that one of the parties acts, in some respects, in subordination to the others, and is to profit less than the others, or not at all, by the consummation of the scheme, does not render such person less a principal.

This rule is elementary, and does not require elaboration or the citation of authorities. Throughout the period covered by these transactions these defendants bought and sold lard and futures and options in lard, and actively engaged in the attempt to carry out the unlawful enterprise. If, at the close of their transactions, Keene and his associates had been found to be owing Kent & Co., we think it very clear that the illegality of the enterprise would have been a perfect defense to an action brought by Kent & Co. to recover the sum due. (*Bartlett v. Smith*, 13 Fed. Rep., 263; *Cobb v. Prell*, 15 *id.* 774; *Irwin v. Williar*, 110 U. S. 499). In the case last cited Mr. Justice MATTHEWS, in

speaking for a unanimous court, said: "In *Roundtree* " *v. Smith* (108 U. S. 269), it was said that brokers who " had negotiated such contracts, suing not on the con- " tracts themselves, but for services performed and " money advanced for defendant at his request, though " they might under some circumstances be so con- " nected with the immorality of the contract as to be " affected by it, they are not in the same position as a " party sued for the enforcement of the original agree- " ment. It is certainly true that a broker might " negotiate such a contract without being privy to " the illegal intent of the principal parties to it which " renders it void, and in such a case, being innocent of " any violation of law, and not suing to enforce an un- " lawful contract, has a meritorious ground for the re- " covery of compensation for services and advances. " But we are also of the opinion that when the broker " is privy to the unlawful design of the parties, and " brings them together for the very purpose of entering " into an illegal agreement, he is *particeps criminis*, " and cannot recover for services rendered or losses " incurred by himself on behalf of either in forwarding " the transaction." (110 U. S. 509.)

Several cases have been cited holding that money or property deposited with a third person, which was derived from or through an unlawful enterprise, may be recovered; and that the illegality of the transaction out of which the money or property arose cannot be successfully asserted as a defense by a mere agent or depositary. This rule is well settled, but it is not germane to this case.

Other cases are cited holding that when the parties to an illegal transaction have accounted, as between themselves, and agreed that a definite sum belongs to each, that an action may be maintained upon the accounting or new promise, and the sum, once admitted to be due, recovered. Admitting these cases to be well decided, they do not aid the appellant. These parties have had no accounting. No admission has been made that a specified sum is due to any one

of them. No promise has been made since the completion of the illegal scheme upon which a recovery is sought. On the contrary, this action is for an accounting between the parties. It is alleged in the complaint that the amount which the plaintiff is entitled to recover is unknown, and can only be ascertained by an investigation of the illegal transactions between the parties. The judgment prayed for is: "That an account may be taken of all the dealings and transactions, purchases and sales of lard made and conducted by said defendants E. A. Kent & Co. under the agreement hereinbefore mentioned," etc.

The relief sought would require the court to investigate all of the various transactions of these parties, from the beginning to the end of their unlawful enterprise and adjust the differences between them. This is precisely what the courts have always refused to do. The fraud which the trial court found was practiced by these defendants upon their associates cannot be too strongly condemned, but courts are not organized to enforce the saying that there is honor among law-breakers, and the desire to punish must not lead to a decision establishing the doctrine that law-breakers are entitled to the aid of courts to adjust differences arising out of, and requiring an investigation of, their illegal transactions.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

"*Leonard v. Poole* (114 N. Y. 371) is a very different case, for the persons interested in those transactions were all of them, under the statutes of this state, **engaged in a conspiracy to commit an act injurious to trade or commerce, and the contract under which they were proceeding was malum in se,** and, hence, presented a situation in which the courts would refuse relief to any of the parties to it, as was said in *Tracy v. Talmage.*"

Per PARKER, C. J., *Irwin v. Curie*, (171 N. Y., 409–415).

"The question in this and kindred cases, therefore, must always be whether the parties are equal in guilt. Obviously cases might arise where this would clearly appear and where the court would be justified in so holding as a matter of law, as where there was an agreement between two, having for its purpose the marriage of one to a third party, the parties would be so clearly *in pari delicto* that the Courts would not aid the one who had paid money to the other in the promotion of the common purpose, to recover it back. Such a case would partake of the character of a conspiracy to defraud. So if two parties entered into a partnership to carry on such a business as defendant conducted, the courts would not lend their aid to either to enforce the agreement between them."

Per BROWN, J.: *Duval v. Wellman*, (124 N. Y. 156, 162).

[58 Ohio State 430; 51 N. E. 28.]

1898.

Markley v. Village of Mineral City.

Municipal corporation—acquisition of land—donation for manufacturing plant—validity of gift.

1. A municipal corporation is without capacity to acquire land by purchase for the purpose of donating the same to a corporation or person as an inducement to build and operate manufacturing plants within the municipality.

2. Corporate funds paid out in the attempted purchase of land for such purpose are unlawfully expended, and a deed purporting to convey such land is without legal effect.

3. And where for the purpose stated, a village has undertaken to purchase and acquire title to land, and to convey it to a person on consideration that he will build and operate manufactories within the village, and afterwards brings its action against such person to set aside the conveyance and obtain a reconveyance of the property with possession thereof, a court of equity will not lend its aid to either party, but will leave them where they have placed themselves.

(Syllabus by the Court.)

Error to circuit court, Tuscarawas county.

Suit by the village of Mineral City against George J. Markley. A decree for defendant was reversed, and defendant brings error. Reversed.

The cause of the village of Mineral City against George J. Markley was tried in the circuit court, Tuscarawas county, on appeal from the common pleas; and it is to the judgment of the circuit court that error is prosecuted here by Markley. The purpose of the suit was to obtain a decree setting aside a deed of three acres of land, which had been made by the village to Markley; to require him to reconvey the premises to the village; and for possession of the property. In its petition the village alleged, in substance: That on the 1st day of March, 1893, it was seized of the land in question. That on that day the council attempted to pass a resolution to convey the real estate to Markley. That on that day the village mayor and the clerk executed and delivered a deed for

the premises to him, which was then delivered to the county recorder and recorded. The resolution was not properly passed. The defendant paid no consideration for the land, but it was attempted to be conveyed to him as a donation to procure him to construct and operate manufacturing plants, in accordance with an agreement to that effect of that date, a copy of which is attached to the petition. *That the defendant has violated his contract, in this: that he has not constructed and operated such plants as agreed, and has thus forfeited any rights that he otherwise might have had.* The mayor and the clerk were never legally authorized to convey the land. No ordinance was passed giving such authority, nor were any of the necessary legal steps taken to make such attempted conveyance effective. The agreement and alleged deed are illegal and void and of no effect, and plaintiff is entitled to a reconveyance. * * *

SPEAR, C. J. (after stating the facts). The pleadings and findings of fact present this question: Had the village power, by deed of purchase, to legally acquire title to and hold real estate, for the sole purpose and with the sole intent of donating the same to procure the construction and operation of manufacturing plants within its limits? Two sections of the constitution seem to bear upon the subject. One (section 6 of article 13) makes it the duty of the general assembly, in providing for the organization of municipalities, to restrict their power of contracting debts and loaning their credit, so as to prevent the abuse of such power. The other (section 6 of article 8) expressly denies to the assembly power to authorize any such corporation to become a stockholder in any joint-stock company, corporation, or association whatever, or to raise money for, or loan its credit to or in aid of, any such company, corporation, or association. And that this interdict applies as well to the case of an individual as to the aggregations named, is without question. It is intended to prevent the union of public and private capital in any enterprise whatever. *In considering the attitude of the village in this controversy, we must look at the entire scheme that was proposed to be ac-*

complished. The first step was to pay out money of the municipality in the purchase of land. The next was a donation of the land so acquired to some one willing to contract, and that person, in turn, to construct and operate the manufacturing plants for the supposed benefit of the people. The village was not to share as a partner in the enterprise, nor to loan its credit for that purpose, nor did it do so; but it did propose, by the wrongful use of corporate funds, to make a purchase, intending thereafter to make a gift of the property so to be acquired, both of which things it undertook to do. *It cannot be doubted that the scheme, taken as a whole, was clearly violative of the spirit of the sections of the constitution cited. And, notwithstanding this, the proposition of the village is that a court of equity should aid it in recovering that which it has undertaken to acquire by a scheme forbidden by law, and has parted with it in compliance with a contract which it had no power to make.* It is to be borne in mind that we are dealing with the status and capacity, not of a natural person, but of a corporate one; a mere creature of the law; an artificial entity, which, having no natural rights or powers, exists and operates only by virtue of the law of its creation. And we suppose it to be settled that our municipalities have such capacities and powers, and such only, as are expressly granted, and such as may be implied as essential to carry into effect those which are expressly granted, and that doubtful claims to power are resolved against the corporation. Cooley, Const. Lim. 231, 232; *Minturn v. Larue*, 23 How. 435; *City of St. Louis v. Bell Tel. Co.* 96 Mo. 623, 10 S. W. 197; 1 Dill. Mun. Corp. Sec. 89, 457; 2 Dill. Mun. Corp. Sec. 936; *Ravenna v. Pennsylvania Co.*, 45 Ohio St. 118, 12 N. E. 445. So that, the question resolves itself into this: Has the power been clearly granted to villages to accept title to land for the express purpose of donating it for the encouragement of local improvements? If not, is such power to be implied, as essential to carry into effect other clearly

granted powers? The right of a municipality to acquire property, is given by paragraph 34 of section 1692, Rev. St., in these words: "To acquire by purchase, or otherwise, and to hold real estate, or any interest therein, * * * for the use of the corporation, and to sell or lease the same." Here is specific mention of the purpose for which land may be acquired. The controlling idea is that the property must be for the use of the corporation. This idea of use implies power to hold. It implies, beyond this, a *jus disponendi*,—a power to deal with the property. If such power does not exist, then its attempted acquisition would be an idle performance. The two ideas are inseparable. If the municipality is without power to hold and dispose of the property, then, by the same token, it is without power to acquire. And we are necessarily confined, in treating of the purpose of acquisition, to the express purpose, viz. "the use of the corporation"; for, applying the maxim, "*Expressio unius est exclusio alterius*," all other purposes are excluded. It would follow, therefore, that if the land be for the use of the municipality, for some legitimate corporate purpose, then power is given, by the clause quoted, to acquire it, and necessarily power to hold and dispose of it. But, if it be not for the use of the corporation (that is, for a use to which the corporation may lawfully devote it), then this clause gives no capacity to receive, or power to hold. Another paragraph of the same section gives power to accept bequests, but that is not involved here, and, so far as we are aware, there is no general power given to acquire real estate, except by the paragraph quoted. Not only, therefore, is there no clear expression of a purpose to give power to acquire and hold real estate for speculative purposes, but the provisions upon the subject, statutory and constitutional, clearly establish that no such power is intended. The chief function of a municipality being to regulate local governmental affairs, because they may be dealt with better by the people interested than by a distant cen-

trial power, we cannot assume a purpose to invest such corporation with the powers or capacities of individuals, or of private corporations, for objects not pertaining to municipal rule, since that would be to pervert the institutions from its legitimate ends, and to require of it duties which it it not adapted satisfactorily to execute, and which are not necessary to enable it to discharge the appropriate functions and duties of local administration. It follows that no such power is to be implied, as essential to carry into effect the power which is in terms given.

If we are right in these conclusions, then it results that the attempted purchase by the village from the Lechner heirs gave to the municipality no title to the land, either legal or equitable. This being the situation, how does it leave the parties? Markley is in possession. The attempted deed of the village gave him no title, but on the other hand, the village has no title to be restored. It cannot prevail except through the medium and with the aid of the illegal transaction to which it was a party, and hence it can have no standing in a court of equity, because it asks affirmative relief under circumstances showing that it is itself in the wrong. The defendant is equally *in pari delicto.* **The court will therefore refuse aid to either, but leave them where by there illegal acts they have placed themselves.** *Thomas v. Cronise*, 16 Ohio, 54; *State v. Buttles*, 3 Ohio St. 309; *Commissioners v. Andrews*, 18 Ohio St. 49; *Board of Education v. Thompson*, 33 Ohio St. 321; *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203.

It is insisted that Markley, having taken a deed from the village, is estopped to deny the title of his grantor. But Markley does not attempt to stand on that title. He distinctly repudiates it. But, if he did, the contract which the plaintiff itself pleads, and the finding of the circuit court, disclose fully the illegal character of the transaction.

Attention is called to section 21, Rev. St., and the proposition is advanced that the attempt of the village

to convey to Markley may be treated as an illegal loan or deposit of the property of the village, which, by this section, it is authorized to recover back. The section cannot apply. We have already found that the land in question was not the property of the village. The spirit, if not the letter, of this statute, was violated by the act of the municipal officers in unlawfully paying the money of the village to the Lechner heirs, not in their futile attempt to convey what the village did not own.

The case of the village seems to rest upon the proposition that the municipality, while it is not bound by the illegal acts of the officers, nevertheless may affirm in part what they did, and thus reap whatever benefit may result from their acts. The proposition is not tenable. It weakness lies in the unfounded assumption that the illegality of the transaction consists wholly in the unauthorized acts of the agents. We have already found that the scheme could have no legal basis, because of the inherent incapacity of the municipality to enter into it. But it is insisted that to deny the relief sought by the village would be to put it in the power of village authorities to make wrongful use of corporate funds, and then refuse relief to the wronged corporation. We think not; at least, not necessarily so. If the vendors, at the time of the attempted conveyance to the village, and the receipt by them of the alleged purchase money, were aware of the purpose of the village authorities in their attempt to acquire the property, no reason is perceived why an action may not be maintained to recover of them the money thus illegally appropriated; and, failing that remedy, it is not impossible that the village officers who thus undertook to make unauthorized use of the village funds may be liable. Of course, however, we do not undertake to decide these questions. They are not involved in this controversy, nor are the proper parties before us.

Judgment of the circuit court reversed, and petition below dismissed. Reversed.

[132 Pa. St. 349; 19 Atl. 139.]

Allebach v. Hunsicker.

(Supreme Court of Pennsylvania. Feb. 17, 1890.)

Lotteries—Deed. Under Purd. Dig. Pa. p. 418, pl. 84, which makes void all deeds and transfers made in pursuance of a lottery, the grantor, in a deed valid on its face, will not be allowed to impeach it by showing that it was given in pursuance of a lottery scheme in which he participated.

Appeal from court of common pleas, Montgomery County.

Ejectment by Jacob M. Allebach against Philip M. Hunsicker. Defendant introduced in evidence a deed from plaintiff to himself. Plaintiff offered to prove that this deed was given in pursuance of a lottery scheme in which the land in dispute was put up as a prize by the plaintiff, and was won by the defendant. The court rejected the offer, and instructed the jury to find for the defendant. Plaintiff appeals. The act of March 31, 1860, Section 52, (Purd. Dig. p. 418, pl. 84), provides "every grant, bargain, sale, conveyance, or transfer of any goods or chattels, lands, tenements, or hereditaments, which shall be made in pursuance of any such lottery, is hereby declared to be invalid and void."

Chas. Hunsicker and Henry Freedley, for appellants, *Louis M. Childs and Montgomery Evans*, for appellee.

Per Curiam. This was an attempt by the plaintiff to set up his own turpitude to defeat his own deed. If the law sanctions this, we would be ashamed to sit here and administer it. Fortunately it does not. The deed upon its face was a valid instrument. The plaintiff could only avoid it by offering to prove the illegal consideration, viz, the lottery scheme, in which he was a participant, and by means of which he was enabled to sell this and a number of other lots. This evidence the court below properly rejected. Granted

that under the act of 31st March, 1860, the deed was void, it was not so upon its face. No part of the lottery transaction appeared thereon, and the plaintiff could only avoid it by showing his own share in the illegal transaction. This, under all our authorities, he could not do. It was said in *Winton v. Freeman*, 102 Pa. St. 366 : "The books are full of cases where a "party to the fraud has sought relief in the courts "from the consequences of his unlawful act, but the "decisions have been uniformly adverse to such appli-"cations. It is not the province of the law to help a "rogue out of his toils. The rule is to leave the par-"ties where it finds them, giving no relief and no "countenance to contracts made in violation of stat-"utes;" citing *Hershey v. Weiting*, 50 Pa. St. 240; *Evans v. Dravo*, 24 Pa. St. 62.

There may be some excuse, in some instances, for men in seeking to disentangle themselves from the web of fraud which they have spun round them, but for this plaintiff there is none. He sold this property by means of this lottery scheme. He received the money, and executed a deed. He retains the money, and now seeks to recover the property back upon the allegation that the deed is void under the act of 1860. It is seldom we meet with a claim so unblushing and conscienceless as this. The learned judge below was right in rejecting his offer of evidence, and to this extent keeping him honest. *Judgment affirmed.*

[2 Pinn, (Wis.) 99 ; 52 Am. Dec. 145]

1849.

Moore v. Kendall.

1. *Jury—Charge of Judge.*—It is the duty of the jury to reconcile the discrepancies or contradictions in the testimony of witnesses, where they exist, if possible ; and it is error to instruct the jury that they ought not to attempt it.

2. *Sale on Sunday.*—Where the sale and delivery of property has been made on Sunday, though prohibited by law, *neither the vendor nor vendee can rescind the sale or recover back the property or the purchase money on that account ;* and a third party, failing to show a claim to the property superior to that of the vendor anterior to such sale and delivery, is barred by a sale thus made from questioning the title of the vendee. The vendee, in such case, may claim the protection of the well settled principle of law, "*in pari delicto potior est conditio defendentis.*"

REPLEVIN.

HUBBELL, J. If this case were to be decided on the weight of evidence as shown by the bill of exceptions, the judgment of the district court might be affirmed. But this court does not sit in the capacity of a jury. The only error assigned related to the charge of the judge.

The action was brought to recover a quantity of merchandise, which had been levied upon by the defendant in error as sheriff of Grant county, under executions in his hands, against the property of James Moore. The plaintiff in error claimed as a purchaser from James Moore. On the trial, James Moore and John Stone were called as witnesses by the plaintiff, to prove a sale and transfer of the property from James Moore to Jonathan B. Moore, the plaintiff in error. Both the fact and the time of the sale became material questions. There was some contradiction or discrepancy between the two witnesses, Jones and Moore, on these points. The sale, if made at all, appears to have been made either on the first day of November, 1847, which was Sunday, or between the first and seventh day of November.

The executions were put into the sheriff's hands on the second, and an actual levy was effected on the tenth; but an effort was made to effect a levy on the sixth, which was resisted, but which must be regarded as having fixed the sheriff's lien on the goods. The court instructed the jury as follows: 1st. "That it "would be reasonable and proper in the jury to recon- "cile slight discrepancies in the testimony of the "plaintiff's witnesses, but if there were contradictions "on material points or facts, equally within their "knowledge, that is to say, James Moore and John "Stone, the plaintiff's witnesses, it certainly was not "the duty of the jury to reconcile such contradic- "tions; it was the plaintiff's misfortune to have "brought on the stand, witnesses contradicting each "other thus, on material facts equally within the "knowledge of each; and the weight of their testi- "mony would be materially weakened, if not almost "entirely destroyed."

The errors assigned on the second branch of the charge were abandoned; and the third was as follows:

"*That if the said sale, by the plaintiff to his brother,* "*James Moore, was made on Sunday, then said sale and* "*transfer, made on that day, was absolutely void, and* "*the purchaser, Jonathan B. Moore, acquired no right* "*or title to the property in dispute.*"

To these instructions exceptions were properly taken, and the question for this court is, whether such instructions were correct.

In regard to the matter of discrepancy, I think the court erred. There was clearly a question of fact for the jury (12 Serg. & R. 283; 5 Wend. 301); and the effect of the charge was to cut off inquiry on the subject. Whether the discrepancies were material or slight, could make no difference that I can understand; and in either case, it should have been left to the jury to try and reconcile them. If, upon a full and fair attempt, they failed, still it would not follow as an inference of law that the testimony of the one was to neutralize that of the other. Conflicting witnesses

are not necessarily to be regarded as opposing powers of equal momentum, which are to be measured by mechanical rules. The court should have told the jury that, failing to reconcile their statement, "on material points, equally within the knowledge of each," it became their duty to inquire whether each of the witnesses was equally credible; whether the statements were equally consistent; whether, from their character, appearance, and relations to the parties, or from any other circumstances connected with their testimony, more reliance ought to be placed upon the one than the other. Very possibly one of them was unworthy of credit; at any rate, it has been urged on the argument by counsel for the defendant in error, that one of them was absolutely perjured—and if so, certainly his statements ought not to have been sufficient to defeat those of the other. Looking at the bill of exceptions, I am inclined to think the charge of perjury is not sustained; but that most of the discrepancy arose, not from statements of fact, but from one of them having sworn to a conclusion of law. And in this view of the case I think their statements might have been reconciled. At all events, it could not happen until the jury should find, in view of all the circumstances I have mentioned, that the weight of evidence was equally balanced, that the court could properly say to them as a matter of law, "that it was the plaintiff's misfortune to have brought to the stand witnesses contradicting each other," and that "the weight of their testimony was greatly weakened, if not almost entirely destroyed."

With respect to the other branch of the instructions, it seems to me the court below was equally in error. Admitting the sale of the goods to have been made on Sunday, it by no means follows that it was void for all purposes. There was an actual transfer of property from James Moore to his brother, the plaintiff in error; and it was not possible thereafter for James Moore or his assigns to recover it back. Between the parties, it was an executed con-

tract; and unless the defendant in error could show some claim superior to that of James Moore, the vendor, he could not disturb the possession of the vendee. On this point the authorities are conclusive. *Inhabitants of Worcester v. Eaton*, 11 Mass. 369; 13 Eng. Com. L. 351; 9 *id.* 193.

This case must not be confounded with others. The defendants in error do not claim against James Moore as an insolvent debtor, with respect to the transfer in question. They do not raise the question of a fraudulent sale. They stand upon the naked right arising from a void sale; a sale void, simply because it was made on Sunday. For the purposes of this question James Moore may be assumed to be a man of ample means and of honest purposes. The point before us is simply this: whether any man, under any circumstances, can make a valid transfer of property on Sunday. If he cannot, the instructions were right, if he can, they were wrong.

I think it would be carrying the rule of law further than the policy of the statute requires, and further than the current of decisions on this subject warrants, to deny that such a transfer, when actually completed, without fraud, should stand between the parties. After such a transfer, notwithstanding the supposed or real violation of the statute, the vendee may claim the protection of that well-settled principle of law, "*In pari delicto potior est conditio defendentis.*"

It is not without regret that I am drawn to these conclusions with respect to the instructions of the learned and able judge of the court below. With my impressions of the merits of the case, as presented in the testimony, I could wish the jury had been left free to pass upon the main questions, which seem to me to be, whether there was an actual sale of the goods before the levy; and if there was, whether such sale was fraudulent as to the creditors? I do not mean by these remarks, to prejudice the case; but inasmuch as the jury may have been improperly controlled by the charge of the judge, there must be a new trial.

Judgment reversed, with costs.

[86 Wis. 176; 56 N. W. 638.]

Cohn v. Heimbauch.

(Supreme Court of Wisconsin. Oct. 17, 1893.)

Impeachment of Witness—Sale made on Sunday—Status of Parties.

1. A witness cannot be impeached by a question whether he had not "once before" testified differently.
2. A party cannot introduce evidence as to what he said at some previous time in regard to the facts in issue.
3. One who sells and delivers property on Sunday cannot recover it on the ground that the sale was void.

Appeal from circuit court, Waukesha County; A. SCOTT SLOAN, Judge.

Action by Samuel Cohn against Daniel Heimbauch. From a judgment for defendant, plaintiff appeals. Affirmed.

ORTON, J. This is an action of trover for the conversion of a horse in April, 1884. The testimony of the defendant and his witnesses tends to prove the following facts: The plaintiff, on the last Sunday in June, 1882, sold the horse to the defendant for the sum of $125, payable on demand, and delivered the possession of the same to the defendant at the same time. *The defendant retained the possession of the horse for several months, when it escaped, or was stolen from his barn, and after much search and inquiry it was found in the possession of the plaintiff, and the* **defendant regained the possession of the horse by a writ of replevin.** The defendant offered and tendered to the plaintiff the price agreed upon, which was refused. The defendant sold the horse to a stranger, and it was taken to parts unknown to him.

The testimony of the plaintiff and his witnesses tends to prove the following facts: On and before the said last Sunday in June, 1882, the horse was and had

been kept in the pasture of the defendant, and the defendant spoke of buying it, if it suited him after trial, and they could agree upon the price. The horse was hitched with another in a wagon, and both parties, with one or two others, drove to Waterford, Racine county, to try the horse, and while there the question of price was discussed. The plaintiff asked $150, and the defendant offered only $115, and they were unable to agree ; and the defendant drove the horse back to its pasture on his premises, as he supposed. The next September the plaintiff was stopping at "Lavins," in the town of Vernon, and when he got up in the morning the horse was standing at the gate, and he took the horse, and had it pastured.

The jury found that the plaintiff sold and delivered the horse to the defendant on the last Sunday in June, 1882, and that it was of the value of $150. The Court also made the same finding, and also that at the time of the sale and delivery it was agreed that the defendant should pay to the plaintiff the sum of $125 for said horse, and *that said purchase price has not been paid*, and that there was no agreement entered into between the parties respecting the property subsequent to said sale, and, as a conclusion of law, that the contract was made in violation of law, and that the defendant was the owner, and entitled to the possession of the property ; and judgment was entered, dismissing the complaint, with costs.

Most of the errors assigned are on the admission or rejection of testimony, and the remarks of the court in connection therewith.

The exceptions, as well as the questions and answers, are very much confused, and it is very difficult to understand what they mean.

1. The plaintiff, it seems, was prosecuted for stealing the horse from the defendant, before a justice, and the defendant was sworn as a witness ; and the counsel of the plaintiff wished to show that the defendant testified on that examination differently, as to the bar-

gain being consummated on Sunday at Waterford, from his testimony on the trial. The justice had the minutes of his testimony present, and he was asked, "Did he further answer, 'when we got to Waterford?'" and "Did he say he bought the mare." The Court said, "We can't go over that trial. He talked about buying, as he testifies now. As he claims, he concluded the trial at Waterford on Sunday in question." The counsel, as it appears, was trying to impeach the defendant, or contradict his testimony, by the minutes of his testimony on that prosecution. That was neither necessary nor proper. The defendant was a party, and the plaintiff could prove by any one what he said on that examination, or anywhere or at any time, about the sale being made on Sunday, and the court properly said that "we can't go over that trial." Afterwards, the court ruled out that record, and then said, "I have examined the evidence, and there is no apparent contradiction in the answer to what he testified here." The counsel of the plaintiff still persisted, "We make the offer," and "offer to prove," etc., and the court said: "I rule out the answer. The answer ruled out." The court was patient, considerate, and clearly right.

2. One Zelotus Hill, a witness for the defendant was asked, on cross-examination, if he had not testified once before to a conversation with plaintiff, in which plaintiff denied that he had sold the mare. The court said he did not think it at all material, and excluded it. The question was clearly improper as well as immaterial. The plaintiff could not manufacture testimony for himself by proving what he said at some former time, and the witness could not be impeached in that way. He must be asked if he said so and so at a particular time and place. The question, "Did you hear the plaintiff say, in your conversation with him afterwards, that he would sue for the mare?" was objectionable for the same reasons. There are some other exceptions, but they do not appear to be material.

3. The learned counsel of the appellant make many objections to the judge's charge to the jury, which we cannot consider because no exceptions were taken to it at the time. But we have read the instructions of the court, and they do not appear to be liable to any objections whatever.

4. On the motion for a new trial, and for judgment in favor of the plaintiff, we are called upon to consider the merits of the case on the testimony. The parties are in direct conflict, in their testimony, as to whether there was a sale and delivery of the horse on the last Sunday in June, 1882. The testimony of the defendant is corroborated to some extent by the testimony of other witnesses. It is, to a considerable extent, a question of credibility, for the jury to determine, and their verdict should not, therefore, be disturbed. *Poertner v. Poertner*, 66 Wis. 644, 29 N. W. Rep. 386.

The jury, as well as the Court, found that there was a sale and delivery of the horse on Sunday, and that must be accepted as a verity in the case. The contract was completed and executed on Sunday, and therefore illegal. The defendant, as the vendee of this property, by a sale and delivery on Sunday, may claim the protection of the maxim "In pari delicto, potior est conditio defendentis." The court will neither enforce nor set aside a contract which is illegal, and not fraudulent, from being made on Sunday. *Hill v. Sherwood*, 3 Wis. 343. *Moore v. Kendall*, 2 Pin. 99, is in point with the facts. *Swartzer v. Gillett*, *Id.*, 238; *Melchoir v. McCarty*, 31 Wis. 252; *Troewert v. Decker*, 51 Wis. 46, 8 N. W. Rep. 26; *Knox v. Clifford*, 38 Wis. 651; *Clarke v. Lumber Co.* 59 Wis. 655, 18 N. W. Rep. 492; *Worcester v. Eaton*, 11 Mass. 369.

The full statement of the principle is that when both parties enter into an illegal contract, without fraud on the part of either, the

courts will leave the contract as they find it, without a remedy to either party. Both parties being equally guilty of a violation of the law, they must abide the consequences, and not ask the Courts to give such a contract the sanction of their approval by affording a remedy to either. The court, having found that this contract was made on Sunday, rendered the proper judgment of a dismissal of the complaint, with costs.

The judgment of the circuit court is affirmed.

List of Decisions in United States Courts.

Bank of U. S. v. Owens, 2 Peters, 527.

Hanauer v. Doane, 12 Wallace, 342.

Thomas v. Richmond, 12 Wallace, 349.

Spring Co. v. Knowlton, 103 U. S. 49.

Thomas v. R. R. Co. 101 U. S., 71.

Irwin v. Williar, 110 U. S. 49.

Higgins v. McCrea, 116 U. S. 671.

Penn. R. R. v. St. L. &c. Co., 118 U. S. 290.

White v. Barber, 123 U. S. 392.

Gibbs v. Con. Gas Co., 130 U. S. 396.

Dent v. Ferguson, 132 U. S. 50.

Central T. Co. v. Pullman Co., 139 U. S. 24.

Logan Co. Bk. v. Townsend, 138 U. S. 67.

Miller v. Ammon, 145 U. S. 428.

St. L. &c. Co. v. T. H. & I. Co., 145 U. S. 398.

Pullman Co. v. Cent. T. Co., 171 U. S. 148.

McMullen v. Hoffman, 174 U. S. 639.

Connolly v. Union &c. Co., 184 U. S. 540.

E. Bement & Sons v. Nat. Harrow Co., 186 U. S. 70.

Nat Bk. &c. Co. v. Petrie, 189 U. S. 423.

W. W. Montague & Co. v. Lowry, 193 U. S. 38.

C. M. & St. P. Co. v. Wabash Co., 61 Fed. 993.

Equitable Co. v. Wetherill, 127 Fed. 947.

[2 Peters, 527.]
1829.

Bank of U. S. v. Owens.

The Branch Bank of the United States, at Lexington, Kentucky, discounted a promissory note, reserving interest thereon, at the rate of six per centum per annum ; it being agreed that the owner of the note should receive the proceeds of the discount in notes of the Bank of Kentucky, at their nominal value, although the same were at the time of no greater current value than fifty-four per cent. of the said nominal value. *Held* that the contract was usurious and void, and that the bank could not recover of any of the parties to the discounted note.

A fraud upon a statute is a violation of the statute.

A profit made, or loss imposed on the necessities of the borrower, whatever form, shape, or disguise it may assume, where the treaty is for a loan, and the capital is to be returned at all events, has always been adjudged to be so much profit taken upon a loan, and to be a violation of those laws which limit the lender to a specific rate of interest. According to this principle, the lender in this case has taken forty-six per cent. for three years, or at the rate of about fifteen per cent. per annum above his prescribed interest. This is contrary to the provisions of the charter of the Bank of the United States, and against law.

Reserving interest as discount, is the same as taking the same ; since it cannot be permitted by law to stipulate for the receipt or reservation of that which it is not permitted to receive. In those instances in which Courts are called upon to inflict penalties upon the lender, whether in a civil or criminal form of action, it is necessarily otherwise ; for there the actual receipt is generally necessary to consummate the offence. But where the restrictive policy of a law alone is in contemplation, we hold it to be an universal rule, that it is unlawful to contract to do that which it is unlawful to do.

The charter of the Bank of the United States forbids the taking of a greater rate of interest than six per centum ; but it does not declare a contract on which a greater interest has been taken or reserved, to be void. Such a contract is void upon general principles. Courts of justice are instituted to carry into effect the

laws of a country, and they cannot become auxiliary to the violation of those laws. There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is in itself illegal.

Mr. Justice JOHNSON delivered the opinion of the Court.

This suit is instituted for the recovery of a promissory note.

The plea is filed by the three last named defendants, who represent themselves as securities to Owens, and sets out in substance, that the note was created for the purpose of enabling Owens to obtain a loan of money from the plaintiff, in the ordinary course of discount; that it was offered for discount, and rejected, and after such rejection, it goes on to aver, that "it was unlawfully, usuriously, and corruptly agreed, by and between the said plaintiffs, by their agents employed in the management and business of the said office, and the said Owens; that they the said plaintiffs would receive and discount the said note, and that the said Owens should receive from them therefor notes of the Bank of Kentucky, or its branches, at the nominal value of said notes, and for the forbearance and loan aforesaid, that Owens should pay said note in current money of the United States, when it fell due, with interest at the rate of six per centum per annum from, &c.; the plea then avers, "that in pursuance of said corrupt and unlawful agreement," this note was passed to the plaintiffs, and Kentucky notes received in loan, "as the sole consideration thereof," at their nominal value, and further, "that at the time the said note was discounted, as aforesaid, the notes of the said Bank of Kentucky and its branches were generally depreciated, so much so, that one hundred dollars thereof, nominally, were of the value of fifty-four dollars only, or less; and current only at that depreciation for greater or smaller sums," &c.; and the defendants further aver, "that the said transaction and dealing was contrary to law,

and the fundamental articles of the said corporation; and the said note founded upon a corrupt and usurious consideration, the said plaintiffs reserving a greater interest than at the rate of six per centum per annum, upon the value of the notes loaned by them, as aforesaid."

To this plea the plaintiffs demurred, and three points are made on which the Court below certify a difference of opinion to this Court.

The 1st is, Whether the facts set forth, and the averments in said plea make out a case on which the corporation has taken more than at the rate of six per centum per annum, upon a loan or discount, contrary to and in violation of the ninth rule of the fundamental articles of the constitution of the corporation.

The proposition here presented to the Court, has relation altogether to the violation of the ninth fundamental rule of the act of incorporation, and it brings under consideration the sufficiency both of the facts and averment contained in the plea, to make out a violation of that article.

I have, myself, entertained very serious doubts of the sufficiency of the averments in the plea; for it is not a case of a direct reservation of a higher interest than the law allows, since on the face of the note only six per cent. is reserved; but the facts are calculated to present one of those cases in which a device is resorted to, by which is reserved a higher profit than the legal interest, under a mask thrown over the transaction; to wit, by taking a note payable in gold or silver, for a loan of depreciated paper; a return, in fact, in specie, for an article of scarcely half the value of specie; a loan of adulterated dollars, for which a note is taken, payable, dollar for dollar, in coin of the United States.

That the law will not tolerate such transactions, has long been settled, for a fraud upon a statute is a violation of the statute.

But the difficulty with me was this, that the plea neither avers an intention to evade the statute, nor a

knowledge in the plaintiffs of the actual depreciation of Kentucky money. I am content, however, to unite with the three of my brethren, who make up the majority on this point, in holding the averments to be sufficient; because, in a considerable dearth of authorities on this subject, I find it decided in the case of *Bolton vs. Durham*, Croke's Reports, Cro. Eliz. 642, that the confession of the *quo animo*, implied in a demurrer, will affect a cause with usury, when a very similar case, in the same book, in which the plaintiff had traversed the plea, was left to the jury with a favorable charge. *Benningfield vs. Ashley*, Cro. Eliz., 741.

In the present instance, the loan; the unconditional return of the sum lent; the illegality, and even corruption of the bargain; are all distinctly averred, and more than once reiterated. If the transaction was corrupt, and in violation of the fundamental laws of the charter, as averred in the plea, and admitted by the demurrer; it could only have been upon the ground of an intention to evade the statute, and with a knowledge of the reduced value of the Kentucky bills.

And it is not unnatural here to remark, that the plea sets out a refusal to make a loan in the ordinary course, to wit, in gold or silver, or the plaintiffs' own notes; and a subsequent agreement to make the loan, provided payment would be received in this depreciated paper. This state of facts presents an obvious analogy to the leading case of *Lowe vs. Waller*, Douglas, 736, in which the negotiation commenced for a loan of money, but terminated in a sale of goods on the re-sale of which, the borrower, (as he was held to be,) sustained a great loss.

The Court charged the lender with that loss, as so much exacted from the necessities of the borrower.

That part of the ninth section of the fundamental rules of the bank charter, which is here drawn in question, is expressed in these words: "The bank shall not be at liberty to purchase any public debt what-

ever, nor shall it take more than at the rate of six per centum per annum, for or upon its loans or discounts."

A profit made, or loss imposed on the necessities of the borrower, whatever form, shape or disguise it may assume where the treaty is for a loan, and the capital is to be returned at all events; has always been adjudged to be so much profit taken upon a loan; and to be a violation of those laws which limit the lender to a specified rate of interest.

According to this principle, the lender has here taken forty-six per cent. for three years, or at the rate of about fifteen per cent. per annum above his prescribed interest. So that in this point the certificate of this Court must be in the affirmative.

Some doubts have been thrown out, whether, as the charter speaks only of taking, it can apply to a case in which the interest has been only reserved, not received. But on that point the majority are clearly of opinion, that reserving must be implied in the word taking, since it cannot be permitted by law to stipulate for the reservation of that which it is not permitted to receive. 1 Hawk. P. C. 620. In those instances in which Courts are called upon to inflict a penalty upon the lender, whether in a civil or criminal form of action, it is necessarily otherwise; for then the actual receipt is generally necessary to consummate the offence. But when the restrictive policy of a law alone is in contemplation, we hold it to be an universal rule, that it is unlawful to contract to do that which it is unlawful to do.

The second question propounded to this Court is, "Whether if the plea does make out a case of violation of a provision of the charter, the notes sued on, or the contract therein expressed, is void in law, so that no recovery can be had therein in this suit."

The question here propounded has relation exclusively to the legal effect of a violation of the provision in the charter, on the subject of interest; and does not bring in question the operation of the statute of usury of Kentucky upon the validity of this contract. To understand the gist of the question, it is necessary to

observe, that although the act of incorporation forbids the taking of a greater interest than six per cent., it does not declare void any contract reserving a greater sum than is permitted. Most, if not all the acts passed in England, and in the states on the same subjects, declare such contracts usurious and void.

The question then is, whether such contracts are void in law, upon general principles.

The answer would seem to be plain and obvious that no court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country, how can they then become auxiliary to the consummation of violations of law.

To enumerate here all the instances and cases in which this reasoning has been practically applied would be to incur the imputation of vain parade.

There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal.

That this is true of contracts violating the laws of morality is recognized in the familiar maxim "*ex turpi causa non oritur actio*", as has been exemplified in some modern cases of a house let for immoral purposes (cited and admitted in 1 B. & P. 340, and Esp. N. P. 13).

In the case of *Aubert* v. *Maze* (2 B. & P. 374) it is expressly affirmed that there is no distinction "as to vitiating the contract between *malum in se* and *malum prohibitum*. And that case is a strong one to this point since the contract there arose collaterally out of transactions prohibited by statute.

So the same doctrine was maintained in equity upon a similar contract in the case of *Watts* v. *Brooks* (3 Ves Jun. 612) in which the Court observes, "There is nothing immoral in this transaction but it is against a prohibitory statute. I doubt a little the policy of the act, but I cannot allow it to be argued that you can break a law covertly. The Court will not execute these contracts."

So in the case of *Webb* v. *Pritchett* (1 B. & P. 264) where the action was by a tavern keeper against a candidate, for provisions furnished to the voters at an election contrary to the Statute of William. Although the statute does not declare the contract void, the Court declared it void and in this explicit language—"This action is apparently founded on a contract to disobey the law. The defense set up proves the principle of the contract. Then how shall an action be maintained in that which is a direct violation of a public law. The contract is bottomed in *malum prohibitum* of a very serious nature in the opinion of the Legislature; how then can we enforce a contract to do that very thing which is so much reprobated by the act. This court cannot give any assistance to the plaintiff consistently with the principles which have governed the courts of justice at all times. Persons who engage in such transactions must not bring their cases before a court of law, &c."

So in the case of assurance in illegal voyages even where the underwriters have contracted with their eyes open, they are notwithstanding permitted to avail themselves of the plea of illegality *ad libitum*, as in the case of *Camden v. Anderson* (6 T. R. 723) adjudged in the King's Bench and affirmed in the Exchequer where it is declared that the defense is founded upon a principle of law which is permanent to all obligation by which the parties to a contract can bind themselves (1 B. & P. 272).

And so in another case of great hardship (*Morck v. Abel*, 3 B. & P. 35) where the insurance was upon a trading in the East Indies prohibited by an obsolete statute, the plaintiff could not even recover back his premium although admitted that the risk never commenced because the policy was void in its inception on the ground of illegality.

Nor is it to voyages illegal by statute alone, that this principle applies. A repectable writer on insurance makes these remarks. "Whenever an insurance is made on a voyage expressly prohibited by the com-

mon, statute or maritime law of the country, the policy is of no effect. The principle on which such a regulation is founded, is not peculiar to this kind of contracts, for it is nothing more than that which destroys all contracts whatsoever, (Park, 232,) that men can never be presumed to make an agreement forbidden by the laws; and if they should attempt it, it is invalid and will not receive the assistance of a court of justice to carry it into execution.

Nor is the rule applicable only to contracts expressly forbidden; for it is extended to such as are calculated to effect the general interest and policy of the country.

Thus a note given by a bankrupt upon a secret compromise with a creditor is declared void; as it produces inequality in the distribution of the bankrupt's effects, and evades the provisions and policy of the law, which proposes to put all the creditors upon an equal footing. *Wells vs. Girling*, 1 Brod. & Bing. 447.

And on the same principle a note given for a wager on the future amount of a branch of the public revenue is declared void; because it interests an individual in diminishing the production of the revenue, 2 T. R. 610. 2 B. & P. 130.

After citing these more modern decisions upon this subject, it may not be amiss to refer to some reporters, whose authority has been consecrated by the respect of ages. They will serve to show the antiquity and universality of this doctrine.

Thus in 1 Bulls. 38, it is laid down that "wherever the consideration which is the ground of the promise, or the promise which is the consequence or effect of the consideration be unlawful, the whole contract is void.

So in Hobart, 72, and Dyer, 356, "if one promises to do a thing that is unlawful, such promise is void."

And innumerable ancient cases might be cited from the best reporters, of the application of the rule to maintenance, to simony, and to promises made to public officers, engaging them to act contrary to the duties of their offices, or to individuals imposing upon them restraint inconsistent with the public interest.

For these reasons, and upon these decisions, the majority of the Court are of opinion that an affirmative answer must also be certified upon the second question in the cause.

And this renders it unnecessary to consider the third question.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the district of Kentucky, and on the questions and points on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this Court for its opinion, and was argued by counsel. On consideration whereof, it is the opinion of this Court, 1. That the facts set forth, and the averments in said plea, make out a case in which the corporation has taken more than at the rate of six per centum per annum upon a loan or discount contrary to and in violation of the ninth rule of the fundamental articles of the constitution of the corporation. 2. That the plea does make out such a case where the notes sued on, or the contract therein expressed to pay the plaintiffs five thousand dollars, is void in law, so that no recovery can be had thereon in this suit. And, 3. This court being of opinion in the affirmative on the first and second points, renders it unnecessary to consider the third question; all of which is ordered and adjudged to be certified to the said Circuit Court.

[103 U. S. 49.]

1880.

Spring Company v. Knowlton.

1. A party to a contract, the making of which, although prohibited by law, is not *malum in se*, may, while it remains executory, rescind it and recover money by him advanced thereon to the other party who had performed no part thereof.

2. The trustees of A., a corporation which was organized under the act of New York of Feb. 17, 1848, for the formation of corporations for manufacturing purposes, and acts amendatory thereof, passed a resolution increasing its capital stock, which was $1,000,000, by the addition of $200,000, allowing each stockholder to take one share of the new stock for every five shares of the original stock which he held, and providing that on his paying in installments $80 on each share of $100, a certificate as for full-paid stock should be issued to him by the company, and on his failure to pay an installment of $20 per share on or before a specified date his claim to the new stock should be forfeited, and such forfeited shares divided ratably among the other stockholders who had paid that installment. A subscription agreement binding the subscribers thereto to take stock and pay $80 per share in installments as they should be called for by the company, and, on failure to pay any installment to submit to the forfeiture of all sums theretofore paid, was prepared and signed by B., who, being then a trustee of A., and its vice-president, was an active promotor of the scheme for the increase of the stock. He paid but one installment of twenty per cent. on his new stock, and the latter was, by a resolution of the company, declared to be forfeited. The capital stock of the company was afterwards reduced to its original amount, and, to refund the payments made on the new stock, withdrawn, bonds were issued. None of them were tendered to or demanded by B. On A's refusing to pay him the amount of that installment, he brought suit therefor. *Held*, that he was entitled to recover.

Error to the Circuit Court of the United States for the Northern District of New York.

Mr. Justice Woods, after stating the case, delivered the opinion of the Court.

The plaintiff in error claims that the plan adopted by it to increase its capital stock, by which certificates as for full paid stock were to be issued on the payment of eighty per cent. thereof, was against the law and public policy of the State of New York, and was, therefore, void; that Knowlton, having been an active party in devising this scheme, and having paid his money in part execution of it, his legal representatives cannot recover the sum so paid.

It is conceded by the defendants in error that the plan adopted by the company to increase its stock was in violation of the law of New York and therefore void. It has been so held, in effect, by the Court of Appeals of the State of New York, in the case of *Knowlton v. Congress & Empire Sewing Co.*, 57 N. Y. 518.

We are, then, to consider whether, upon the hypothesis that the plan for the increase of the stock was illegal, there can be a recovery upon the facts of the case as found by the Circuit Court.

We think it clear that there was only a part performance of the illegal contract between the company and Knowlton, in reference to the new stock for which Sheehan subscribed, and which he agreed to transfer to Knowlton.

The company, in fact, created no new stock. It only proposed to do so. To increase the stock of the company it was not only necessary that the meeting of the stockholders should be called, as prescribed by the law, and a vote of two-thirds of all the shares of stock should be cast at the meeting in favor of the increase, but that there should be a certificate of the proceedings, showing, among other things, a compliance with the provisions of the law, and the amount of the increase of the stock, signed and verified by the affidavit of the chairman of the meeting at which the increase was voted, and countersigned by the secretary, and such certificate should be acknowledged oy the chairman and filed, as required by the first section of the act. And the

law declared that "when so filed the capital stock of such corporation shall be increased to the amount specified in such certificate."

It does not appear from the findings of the Circuit Court that any such certificate was ever made or filed. Consequently it does not appear that the steps necessary, under the law, to an increase of the stock were ever taken. Neither does it appear that any scrip or certificates were ever issued to the subscribers to the new stock. So that all that was done amounted only to a proposition by the company, on the one hand, to increase its stock, and an agreement by Knowlton to take certain shares of the new stock when issued, and the payment by him of an instalment of twenty per cent. thereon. *There was no performance of the contract whatever by the company, and only a part performance by Knowlton.*

It is to be observed that the making of the illegal contract was *malum prohibitum* and not *malum in se.* There is no moral turpitude in such a contract, nor is it of itself fraudulent, however much it may afford facilities for fraud.

The question presented is, therefore, whether, conceding the contract to be illegal, money paid by one of the parties to it in part performance can be recovered, *the other party not having performed the contract or any part of it,* and both parties having abandoned the illegal agreement before it was consummated.

We think the authorities sustain the affirmative of this proposition.

Their result is fairly stated in 2 Comyn on Contracts, 361, as follows:—

"Where money has been paid upon an illegal contract, it is a general rule that if the contract be executed and both parties are *in pari delicto,* neither of them can recover from the other the money so paid, but if the contract continues executory and the party paying the money be desirous of rescinding it, he may do so and recover back by action of *indebitatus assumpsit* for money had and received. And this distinction is taken in the books that where the action is

in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained, but where the action proceeds in disaffirmance of such a contract, and instead of endeavoring to enforce it presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, then it is consonant to the spirit and policy of the law that the plaintiff should recover."

Mr. Parsons, in his work on Contracts, vol. ii. p. 746, says:—

"All contracts which provide that anything shall be done which is distinctly prohibited by law, or morality, or public policy, are void, so he who advances money in consideration of a promise or undertaking to do such a thing, may at any time before it is done rescind the contract and prevent the thing from being done and recover back his money."

To the same effect see 2 Addison, Contracts, sect. 1412; Chitty, Contracts, 944; 2 Story, Contracts, sect. 617; 2 Greenl. Evid., sect. 111.

The views of the text writers are sustained by a vast array of authorities, both English and American.

A few will be cited. *Taylor v. Bowers* (1 Q. B. D. 291) was an action to recover property assigned for the purpose of defrauding creditors. A verdict was rendered for the plaintiff with leave to move to enter a verdict for the defendant. A rule was obtained on the ground that the plaintiff could not by the allegation of his own fraud get back the goods from the defendant. The Queen's Bench sustained the verdict, the Chief Justice, COCKBURN, delivering the opinion. The defendant then appealed to the Court of Appeals, where the judgment was affirmed. Both courts agreed that an illegal contract partially performed might be repudiated and the money paid upon it recovered.

Lord Justice MELLISH, in the Court of Appeals, said: "If the illegal transaction had been carried out, the "plaintiff himself, in my judgment, could not afterwards "have recovered the goods. But the illegal transac-

" tion was not carried out; it came wholly to an end. " To hold that the plaintiff is entitled to recover does " not carry out the illegal transaction, but the effect is to " put everybody in the same situation as they were be- " fore the illegal transaction was determined upon, and " before the parties took any steps to carry it out. " That, I apprehend, is the true distinction in point of " law. If money is paid or goods delivered for an " illegal purpose, the person who had so paid the " money or delivered the goods may recover them " back before the illegal purpose is carried out; but " if he waits till the illegal purpose is carried out, or " if he seeks to enforce the illegal transaction, in " neither can he maintain an action; the law will not " allow that to be done."

The same rule substantially is laid down in the following English cases: *Lowry v. Bourdieu*, 2 Doug. 452; *Tappenden v. Randall*, 2 Bos. & Pul. 467; *Hastelow v. Jackson*, 8 Barn. & Cress. 221; *Bone v. Ekless*, 5 H. & N. 925; *Lacaussade v. White*, 7 T. R. 531; *Cotton v. Thurland*, 5 *id.* 405; *Mount v. Stokes*, 4 *id.* 561; *Smith v. Bickmore* 4 Taunt. 474.

In *Morgan v. Groff* (4 Barb. (N. Y.) 524), it was held that money paid on an illegal contract, which remains executory, can be recovered back in an action founded on a disaffirmance, and on the ground that it is void.

To the same effect are the following cases: *Utica Insurance Co. v. Kip*, 8 Cow. (N. Y.) 20; *Merritt v. Millard*, 4 Keyes (N. Y.), 208; *White v. Franklin Bank*, 22 Pick. (Mass.) 181; *Lowell v. Boston & Lowell Railroad Corporation*, 23 *id.* 24.

In *Thomas v. City of Richmond* (12 Wall 349) this Court cites with approval the note of Mr. Frere to the case of *Smith* v. *Bromley* (2 Doug. 696), to the effect that a recovery can be had as for money had and received when the illegality consists in the contract itself, and that contract is not executed; in such case there is a *locus penitentiæ;* the *delictum* is incomplete; the contract may be rescinded by either party.

The rule is applied in the great majority of the

cases, even when the parties to the illegal contract are *in pari delicto*, the question which of the two parties is the more blameable being often difficult of solution and quite immaterial. We think, therefore, that the facts of this case present no obstacle to a discovery by Knowlton's administrators of the sum paid by him on the stock which had been subscribed for by Sheehan.

The law of New York does not in express terms forbid a corporation from issuing certificate for full-paid stock when the stock has not been fully paid. The illegality of such an issue is deduced from several sections of the law under which the Congress and Empire Spring Company was organized, namely, sects. 38, 40, 41 and 49. We think it is fairly inferable from the record that the trustees of the company, one of whom was Knowlton, did not know that the plan adopted by them for the increase of the stock was illegal, and that when they discovered that it was forbidden by the law, and before any harm was done or could have been done, the scheme was abandoned. Under such circumstances, the rule which would prevent the recovery of the money paid to carry on the illegal plan would be a very harsh one, not founded on any law or public policy.

It is suggested by counsel for the plaintiff in error that the Court of Appeals of the State of New York has in this identical suit, upon the same state of facts, adjudicated the rights of the parties, and that this court ought to consider the questions raised in this case as *res judicata*.

The reply to this suggestion is that it nowhere appears in the record that this case was ever before the Court of Appeals, or that it was ever decided by any Court except by the United States Circuit Court for the Northern District of New York, from which it has been brought to this court on error. We cannot consider facts not brought to our notice by the record.

Judgment affirmed.

Mr. Justice HARLAN dissenting (on special ground).

[130 U. S. 396.]

1889.

Gibbs v. Consolidated Gas Company.

* * * * * *

Where particular contracts are inhibited by statute, and if attempted, are in positive terms declared "utterly null and void," such contracts will not be enforced.

Recovery cannot be had for services rendered, or losses incurred, in securing the execution of an illegal agreement, by a party privy to the unlawful design.

The case as stated by the court in its opinion, was as follows :

Plaintiff in error brought this action in the Circuit Court of the United States for the District of Maryland against the defendant in error, "a corporation duly incorporated under the laws of Maryland, for money payable by the defendant to the plaintiff," as stated in the "bill of particulars of plaintiff's claim," "for services rendered by me at your request in negotiating and consummating an arrangement and settlement of differences between the Consolidated Gas Co. of Balto. City and the Equitable Gas Light Co. of Balto. City, between July 1st, 1884, and November 1st, 1884, $50,000 ;" and a trial was had upon the general issue pleaded, resulting in verdict and judgment for the defendant, May 14, 1885.

* * * * * *

Mr. Chief Justice Fuller delivered the opinion of the Court :

* * * * * *

These gas companies entered the streets of Baltimore, under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to fulfill the public purposes to subserve which they were incorporated. At common law corporations formed merely

for the pecuniary benefit of their shareholders could, by a vote of the majority thereof, part with their property and wind up their business, but corporations to which privileges are granted in order to enable them to accommodate the public, and in the proper discharge of whose duties the public are interested, do not come within the rule. But we are not concerned here with the question when, if ever, a corporation can cease to operate without forfeiture of its franchises, upon the excuse that it cannot go forward because of expense and want of remuneration. There is no evidence in this record of any such state of case, and, on the contrary, it appears that the cost of the manufacture of gas was largely below the price to be charged named in the stipulation between the parties. There is nothing upon which to rest the suggestion that the companies were unable to serve the consumers, while the record shows, on the other hand, that they simply desired to make larger profits on whatever gas they might furnish. Nor are we called upon to pass upon the validity generally of pooling agreements. Here the contract was directly in the teeth of the statute, which expressly forbade the Equitable Gas-Light Company from entering into it. That prohibition declared the policy of the State as well as restrained the particular corporation.

The distinction between malum in se and malum prohibitum has long since been exploded and as "There can be no civil right "where there can be no legal remedy and "there can be no legal remedy for that "which is itself illegal" *(Bank of U. S.* v. *Owens*, 2 Pet. 527, 539) **it is clear that contracts in direct violation of statutes expressly forbidding their execution cannot be enforced.**

The question is not one involving want of authority to contract on account of irregularity of organization or lack of an affirmative grant of power in the charter of a corporation, but a question of the absolute want

of power to do that which is inhibited by statute and if attempted is in positive terms declared "utterly null and void." "The rule of law" said PARKER *Ch. J.* in *Russell* v. *De Grand*, 15 Mass. 35-39, "is of "universal operation that none shall by the aid of the "Court of Justice obtain the fruits of an unlawful "bargain."

We cannot assist the plaintiff to get payment for efforts to accomplish what the law declared should not be done and the judgment must be affirmed.

[145 U. S. 393.]

St. Louis, Vandalia and Terre Haute R. R. Co. v. Terre Haute and Indianapolis R. R. Co.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

No. 42. Argued April 24, 27, 28, 1891.—Decided May 16, 1892.

The statute of Illinois of February 12, 1855, empowering all railroad corporations incorporated under the laws of the State to make "contracts and arrangements with each other, and with railroad corporations of other States, for leasing or running their roads," authorizes a railroad corporation of Illinois to make a a lease of its road to a railroad corporation of another State; but confers no power on a railroad corporation of the other State to take such a lease, if not authorized to do so by the laws of its own State.

A railroad corporation of Indiana is not empowered to take a lease of a railroad in another State by the statute of Indiana of February 23, 1853, c. 85, authorizing any railroad corporation of that State to unite its railroad with a railroad constructed in an adjoining State, and to consolidate the stock of the two companies; or to extend its road into another State; or "to make such contracts and agreements with any such road constructed in an adjoining State, for the transportation of freight and passengers, or for the use of its said road, as to the board of directors may seem proper."

A lease for nine hundred and ninety-nine years by one railroad corporation of its railroad and franchise to another railroad corporation, which is *ultra vires* of one or of both, will not be set aside by a court of equity at the suit of the lessor, when the lessee has been in possession, paying the stipulated rent, for seventeen years, and has taken no steps to repudiate or rescind the contract.

This was a bill in equity, filed July 6, 1887, by the St. Louis, Vandalia and Terre Haute Railroad Com-

pany, a corporation of Illinois, against the Terre Haute and Indianapolis Railroad Company, a corporation of Indiana, to set aside and cancel a conveyance to the plaintiff's railroad and franchises to the defendant for a term of nine-hundred and ninety-nine years.

The bill contained the following allegations:

That the plaintiff was incorporated by a statute of Illinois of February 10, 1865, amended by a statute of February 8, 1867, to construct and maintain a railroad from the left bank of the Mississippi River opposite St. Louis eastward through the State of Illinois to a point on the Wabash River, convenient for extending its road to Terre Haute in the State of Indiana; and was not authorized by its charter, or by any law of Illinois, to lease its railroad, or by any other contract or conveyance to part with the entire possession, control and use of its property and franchises, or to deprive itself of and vest in others the power of control in the management of its said road and other property and in the exercise of its franchises, including the right to impose and collect tolls for the transportation of passengers and freight, indefinitely or for any fixed period of time.

That the defendant was incorporated by a statute of Indiana of January 26, 1847, amended by a statute of March 6, 1865, to construct and maintain a railroad from some point on the western line of the State of Indiana eastward through Terre Haute to Indianapolis; and was not authorized by its charter, or by any law of Indiana, to make or accept any lease, contract or other conveyance by which it should acquire or obtain, either indefinitely or for a fixed time, the ownership, management or control of any railroad located beyond the limits of Indiana.

That the plaintiff proceeded to construct, and on or about July 1, 1870, completed the construction and equipment or its road; that in order to obtain money for this purpose, on April 6, 1867, it executed a mortgage or deed of trust of all its railroad, property and franchises, to secure the payment of bonds amounting

to $1,900,000, and agreeing to set apart annually from its earnings the sum of $20,000, as a sinking fund for payment of the bonds; that on March 13, 1868, it executed a second mortgage to secure the payment of additional bonds to the amount of $2,600,000; that all the bonds aforesaid were sold, and outstanding and unpaid; and that no sinking fund had been created, as provided for in the first mortgage.

That on February 10, 1868, the plaintiff and the defendant executed a pretended lease, (set forth in the bill, and copies in the margin,) of the plaintiff's railroad, property and franchises to the defendant for nine hundred and ninety-nine years, the defendant retaining sixty-five per cent of the gross receipts, and the rest to be applied to the payment of interest on the mortgage bonds, and any surplus paid to the plaintiff.

That on January 12, 1869, the plaintiff's board of directors passed a resolution, undertaking to authorize its president to change the terms of said lease so that the defendant should be allowed seventy, instead of sixty-five per cent of the gross receipts, "but if the working and maintenance expenses of said road shall be less than seventy per cent of the gross receipts aforesaid, then all such excess shall be paid over to" the plaintiff.

That by a statute of Illinois of February 16, 1865, in force at the time of the execution and delivery of the pretended lease, it was not lawful for any railroad company of Illinois, or its directors, to consolidate its railroad with any railroad out of the State, or to lease its railroad to any railroad company out of the State, or to lease any railroad out of the State, without the written consent of all its stockholders residing within the State; and that fifty-nine of the plaintiff's stockholders residing in Illinois never consented to or ratified the lease.

That, on the completion of the plaintiff's road, the defendant took possession of and had ever since operated it, and had received, in tolls and otherwise,

more than $21,600,000; that the pretended lease was void, for want of lawful power in either party to enter into it; that the defendant by taking possession of the plaintiff's railroad and property without right, became in equity a trustee of the plaintiff, and liable to account to it for the property and for all tolls and emoluments which the defendant had, or ought to have, collected and received therefrom, and to restore the property to the plaintiff; that the defendant had refused, though requested, to turn over to the plaintiff the road and property, or the income thereof, and had thus rendered the plaintiff unable to establish a sinking fund, as required by the first mortgage; and that great and irreparable injury would be done to the plaintiff and its stockholders unless it was restored to the possession and control of the railroad, property and franchises.

That at the time when the lease was executed by the plaintiff its officers supposed that it had lawful power to do so; but that it had recently been advised by counsel that it had no such power, that it was its duty at once to repudiate this pretended lease and to resume the possession, control and use of its property and franchises, and that it had rendered itself liable to have its charter forfeited by the State; that the present income was more than sufficient to pay the interest on the bonds and to establish a sinking fund; and that, by reason of the failure to establish a sinking fund, proceedings might at any time be instituted to foreclose the first mortgage.

That the taking of long and complicated accounts, covering a period of nearly seventeen years and involving a great many items, was necessary for the protection and enforcement of the plaintiff's right; that the pretended lease was a cloud on the plaintiff's title; that a court of law had no jurisdiction adequate to take the account or to cancel the lease; and that the defendant was daily withdrawing large sums of money from the jurisdiction of the court to the irreparable injury of the plaintiff.

The bill, as originally framed, prayed for a cancellation and surrender of the lease, for a return of the railroad and other property held under it, for an injunction against disturbing the plaintiff in the possession and control thereof, and for an account of the sums which the defendant had received, or with due diligence might have received, from the use and operation of the railroad and property; or, if the lease should be held valid, for an account of the sums due under the lease; and for further relief.

The defendant demurred to the bill, for want of equity, for laches, for multifariousness, and because the plaintiff had an adequate remedy at law. The Circuit Court sustained the demurrer on all these grounds, as stated in its opinion reported in 33 Fed. Rep. 440. The plaintiff thereupon, by leave of court, amended the bill, by striking out the prayer for alternative relief in case the lease should be held valid. The defendant demurred to the amended bill on the same grounds as before, except multifariousness. The court, delivering no further opinion, sustained the demurrer, and dismissed the bill; and the plaintiff appealed to this court.

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the court.

The object of this suit between two railroad corporations, as stated in the amended bill, is to have a contract, by which the plaintiff transferred its railroad and equipment, as well as its franchise to maintain and operate the road, to the defendant, for a term of nine hundred and ninety-nine years, set aside and cancelled, as beyond the corporate powers of one or both the parties.

The contract, dated February 10, 1868, recites that the plaintiff is a corporation of Illinois, and the defendant a corporation of Indiana; that their railroads connect at the line between the two States; that it is desirable that the two roads should be operated by the defendant as one road; and that the defendant has

"proposed to lease and operate" the plaintiff's road for a period of nine hundred and ninety-nine years.

"It is therefore agreed" that, upon the completion of the plaintiff's road to the state line, the defendant "shall take charge of and operate the same with its equipment" for that period, and "shall be allowed sixty-five per cent of the gross receipts from all traffic moved over the line, or business done thereon, and from the property of the company, as a consideration for working and maintenance expenses," and shall appropriate the rest of such receipts to the payment of interest on the plaintiff's mortgage bonds, and pay any surplus to the plaintiff for the benefit of its stockholders. Within a year afterwards, the contract was modified by providing that the defendant should be allowed seventy (instead of sixty-five) per cent of the gross receipts, "but if the working and maintenance expenses of said road shall be less than seventy per cent of the gross receipts aforesaid, then all of such excess shall be paid over to the" plaintiff. It is further agreed in the contract that the defendant "shall enjoy all the rights, powers and privileges of the" plaintiff, "so far as the same may be needful to maintain and operate said railroad," and may "impose and collect tolls and rates for transportation, and do all other acts and things, as fully and as effectually as the" plaintiff "could do if operating said line."

In short, by this contract one railroad corporation undertook to transfer its whole railroad and equipment, and its privileges and franchise to maintain and operate the road, to another railroad corporation for a term of nine hundred and ninety-nine years, in consideration of the payment from time to time by the latter to the former of a certain portion of the gross receipts. This was, in substance and effect, a lease of the railroad and franchise for a term of almost a thousand years, and was a contract which neither corporation had the lawful power to enter into, unless expressly authorized by the State which created it, and which, if beyond the scope of the lawful powers

of either corporation, was unlawful and wholly void, could not be ratified or validated by either or both, and would support no action or suit by either against the other. *Thomas v. Railroad Co.*, 101 U. S. 71; *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 630; *Oregon Railway v. Oregonian Railway*, 130 U. S. 1; *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24.

Upon the question whether this contract was *ultra vires* of either corporation, this case cannot be distinguished in principle from *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute Railroad*, above cited.

By the statute of Illinois of February 12, 1855, all railroad companies incorporated under the laws of the State were empowered to make "contracts and arrangements with each other, and with railroad corporations of other States, for leasing or running their roads, or any part thereof." Illinois Private Laws of 1855, p. 304; Rev. Stat. of 1874, c. 114, Sec. 34. By the grammatical and the natural construction, the words "their roads" include roads of Illinois corporations, as well as roads of corporations of other States, and the power conferred on corporations of Illinois to make contracts "for leasing" such roads includes making, as well as taking, leases thereof. Such was the opinion expressed in the case just cited, at page 309, and we see no reason for departing from it.

The plaintiff relies on the statute of Illinois of February 16, 1865, (in force at the date of this contract, but since repealed by the Revised Statutes of 1874), by which it was enacted that "it shall not be lawful for any railroad company of Illinois, or for the directors of any railroad company of Illinois, to consolidate their road with any railroad out of the State of Illinois, or to lease their road to any railroad company out of the State of Illinois, or to lease any railroad out of the State of Illinois, without having first obtained the written consent of all of the stockholders of said roads residing in the State of Illinois, and any contract for such consolidation or

lease which may be made without having first obtained said written consent, signed by the resident stockholders in Illinois, shall be null and void"; and it was provided "that nothing in this act shall be so construed as to authorize the consolidation of any of said railroads with railroads out of the State of Illinois." Illinois Public Laws of 1865, p. 102.

Although this statute, in terms, declares that any such lease, made without the written consent of the Illinois stockholders, "shall be null and void," it would seem to have been enacted for the protection of such stockholders alone, and intended to be availed of by them only. It did not limit the scope of the powers conferred upon the corporation by law, an excess of which could not be ratified or be made good by estoppel; but only prescribed regulations as to the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped, by lapse of time, or otherwise, to deny. *Zabriskie v. Cleveland &c. Railroad*, 23 How., 381, 398; *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S., 24, 42, 60; *Davis v. Old Colony Railroad*, 131 Mass., 258, 260; *Beecher v. Marquette & Pacific Co.*, 45 Michigan, 103; *Thomas v. Citizens' Railway*, 104 Illinois, 462.

The decision of the Supreme Court of Illinois in *Archer v. Terre Haute & Indianapolis Railroad*, 102 Illinois, 493, cited by each party at the argument, does not appear to have any important bearing upon this case. The point there decided was that the contract now in question, not being satisfactorily proved in that case to have been either assented to or ratified by the stockholders residing in Illinois, had no effect, as a lease, to convey title to the defendant, and could be sustained, if at all, only as a contract for the connection of the two railroads, and, in either aspect, did not confer on the defendant any right to maintain a bill in equity against collectors of taxes to restrain the collection of taxes assessed to the present plaintiff. Upon questions discussed in the opinion and not necessary

to the judgment, or not considered at all, the case cannot be regarded as a decision, because, as observed by Mr. Justice CURTIS, speaking for this court, "to make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties." *Carroll v. Carroll*, 16 How. 275, 287.

It is unnecessary, however, to express a definitive opinion upon the question whether the contract between these parties was beyond the corporate powers of the plaintiff, because, as is established by the decision of this court, already cited, a contract beyond the corporate powers of either party is as invalid as if beyond the corporate powers of both, and the contract now in question was clearly beyond the corporate powers of the defendant.

The case in this respect is governed by the direct adjudication of this court in the case of *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute Railroad*, above cited, which was much considered, both upon argument at the bar, and upon petition for a rehearing. The only differences between that case and this are that the contract in that case was for ninety-nine years, whereas in this it is for nine hundred years more; that the rent is computed in a different way, which does not alter the nature and effect of the transaction; and that in that case the two roads did not connect at the state line, but a few miles east of it, which was held to be immaterial. 118 U. S. 295–297.

The plaintiff in that case, like the defendant in this, sought to support the validity of the contract under the statute of Indiana of February 23, 1853, c. 85, of which section 1 authorized any railroad company of Indiana "to intersect, join and unite its railroad with any other railroad" constructed in an adjoining State, at any point on the state line or elsewhere to which the charters of the two companies authorized their roads to go, and to consolidate the stock of the two companies; section 2 authorized any railroad company of Indiana whose road went to the state line "to

extend its said railroad into or through any other State," under such regulations as might be prescribed by the laws thereof; and section 3 authorized any railroad company of Indiana, whose road met and connected at the state line with a railroad in an adjoining State, "to make such contracts and agreements with any such road constructed in an adjoining State, for the transportation of freight and passengers, or for the use of its said road, as to the board of directors may seem proper." Indiana Rev. Stats. of 1881, Secs. 3971–3973.

At the argument of that case, indeed, the third section, being the one affording the most plausible ground, was principally relied on, and was the only section of this statute discussed in the original opinion. 118 U. S. 312. But in that opinion reference was made to *Tippecanoe Commissioners v. Lafayette &c. Railroad*, in which the Supreme Court of Indiana held that this statute did not authorize one railroad corporation to lease its railroad to another with a right of perpetual renewal, and said: "To connect one road with another does not fairly mean to sell or lease it to another." 50 Indiana, 85, 110; 118 U. S. 312. And upon the petition for rehearing all three sections of the statute in question, as well as other statutes of Indiana, were cited by counsel, and examined by the court, although its conclusions were briefly stated, according to its usage in an opinion delivered on a petition for rehearing. 118 U. S. 633, 634.

It is argued for the defendant that this suit is distinguished from the former one in being brought, not, as that was, in Indiana, but in Illinois, and must therefore be controlled by the law and policy of Illinois; and it is contended that the statute of Illinois of 1855, above cited, empowered the defendant, though an Indiana corporation, to take a lease of a railroad in Illinois. But such a suit as this is governed, so far as regards the validity of the contract, not by the law of the forum, but by the law of the contract; and the statute of Illinois was manifestly intended to confer power on domestic corporations only, leaving the pow-

ers of corporations incorporated elsewhere to be determined by the laws by and under which they were incorporated, even if a State could confer on a foreign corporation powers which it did not have by the laws of its own State. *Canada Southern Railway v. Gebhard*, 109 U. S. 527, 537; *Christian Union v. Yount*, 101 U. S. 362; *Starkweather v. American Bible Society*, 72 Illinois, 50; *Santa Clara Academy v. Sullivan*, 116 Illinois, 375, 385.

It may therefore be assumed, as contended by the plaintiff, that the contract in question was *ultra vires* of the defendant, and therefore did not bind either party, and neither party could have maintained a suit upon it, at law or in equity, against the other.

It does not, however, follow that this suit to set aside and cancel the contract can be maintained. If it can, it is somewhat remarkable that, in the repeated and full discussions which the doctrine of *ultra vires* has undergone in the English courts within the last fifty years, no attempt has been made to bring a suit like this. The only cases cited in the elaborate briefs for the plaintiff, or which have come to our notice, approaching this in their circumstances, are in American courts not of last resort, and present no sufficient reasons for maintaining this suit. *Auburn Academy* v. *Strong*, Hopkins Ch. 278; *Atlantic & Pacific Telegraph Co.* v. *Union Pacific Railway*, 1 McCrary, 541; *Western Union Telegraph Co.* v. *St. Joseph & Western Railway*, 1 McCrary, 565; *Union Bridge Co.* v. *Troy & Lansingburgh Railroad*, 7 Lansing, 240; *New Castle Railway* v. *Simpson*, 21 Fed. Rep. 533.

The English cases relied on by the plaintiff were either suits to set aside marriage brokage bonds, as in *Drury* v. *Hooke*, 1 Vernon, 412, and *Smith* v. *Bruning*, 2 Vernon, 392; *S. C. nom. Goldsmith* v. *Bruning*, 1 Eq. Cas. Ab. 89; or to recover back money paid for the purchase, without leave of the Crown, of a commission in the military or naval service as in *Morris* v. *McCullock*, Ambler 433; S. C. 2 Eden, 190. Those cases have sometimes been justified upon the ground that, the agreement being against the policy of the law, the

relief was given to the public through the party. *Debenham* v. *Ox*, 1 Ves. Sen. 276; *St. John* v. *St. John*, 11 Ves. 526, 536; *Cone* v. *Russell*, 3 Dickinson (48 N. J. Eq.) 208. But Sir WILLIAM GRANT explained them as proceeding upon the ground that the plaintiff was less guilty than the defendant. *Osborne* v. *Williams*, 18 Ves. 379, 382. And *Morris* v. *McCullock*, can hardly be reconciled with his decision in *Thomson* v. *Thomson*, 7 Ves. 470, or with the current of later authorities.

The general rule, in equity, as at law, is *In pari delicto potior est conditio defendentis;* and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas* v. *Richmond*, 12 Wall., 349, 355; *Spring Co.* v. *Knowlton*, 103 U. S. 49; Story Eq. Jur. § 298.

While an unlawful contract, the parties to which are in pari delicto, remains executory, its validity is a defense in a court of law; and a court of equity will order its cancellation only as an equitable mode of making that defense effectual, and when necessary for that purpose. Adams on Eq. 175. Consequently, it is well settled, at the present day, that a court of equity will not entertain jurisdiction to order an instrument to be delivered up and cancelled, upon the ground of illegality appearing on its face, and when, therefore, there is no danger that the lapse of time may deprive the party to be charged upon it of his means of defense. Story Eq. Jur. § 700*a*, and cases cited; *Simpson* v. *Howden*, 3 Myl. & Cr. 97; *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275, 282.

When the parties are in pari delicto, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or

by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. *Thomas* v. *Richmond*, above cited; *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275, 284. For instance, property conveyed pursuant to a contract made in consideration of the compounding of a crime, and the stifling of a criminal prosecution, and therefore clearly illegal, cannot be recovered back by law, nor the conveyance set aside in equity, unless obtained by such fraud or oppression on the part of the grantee, that the conveyance cannot be considered the voluntary act of the grantor. *Worcester* v. *Eaton*, 11 Mass. 368, and 13 Mass. 371; *Atwood* v. *Fisk*, 101 Mass. 363; *Bryant* v. *Peck & Whipple Co.*, 154 Mass. 460; *Williams* v. *Bayley*, L. R. 1 H. L. 200; *Jones* v. *Merionethshire Society*, 1892, 1 Ch. 173, 182, 185, 187.

In the case at bar, the contract by which the plaintiff conveyed its railroad and franchise to the defendant for a term of nine hundred and ninety-nine years was beyond the defendant's corporate powers, and therefore unlawful and void, of which the plaintiff was bound to take notice. The plaintiff stood in the position of alienating the powers which it had received from the State, and the duties which it owed to the public, to another corporation, which it knew had no lawful capacity to exercise those powers or to perform those duties. If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position.

In either aspect of the case, the plaintiff was in pari delicto with the defendant. The invalidity of the contract, in view of the laws of which both parties were bound to take notice, was apparent on its face. The contract has been fully executed on the part of the plaintiff by

the actual transfer of its railroad and franchise to the dfeendant; and the defendant has held the property, and paid the stipulated consideration from time to time, for seventeen years, and has taken no steps to rescind or repudiate the contract.

Upon this state of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders, and seeking to protect their interest, it and they were bared by laches.

Harwood v. *Railroad Co.*, 17 Wall. 78; *Graham* v. *Birkenhead &c. Railway*, 2 Hall. & Twells, 450, s. c. 2 Macn. & Gord. 146; *Ffooks* v. *Southwestern Railway*, 1 Sm. & Gif. 142, 164; *Gregory* v. *Pachett*, 11 Law Times (N. S.) 357.

This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him and had no right to retain.

Spring Co. v. *Knowlton*, 103 U. S. 49; *Logan County Bank* v. *Townsend*, 139 U. S. 67, and cases there cited.

But the case is one in which, in the words of Mr. Justice Miller, in a case often cited in this opinion, the court will not disturb the possession of the property that had passed under the contract, but will refuse to interfere as the matter stands.

Pennsylvania Railroad v. *St. Louis*; *Alton & Terre Haute Railroad*, 118 U. S. 290, 316, 317. See also *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434, 468, 469; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 56, 57, 61.

Decree affirmed.

[139 U. S. 24.]

Central Transportation Company vs. Pullman's Palace Car Co.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 379. Argued January 28-29, 1890,—Decided March 2, 1891.

A statute of a state, which authorizes the judge presiding at the trial to order a judgment of nonsuit to be entered, when in his opinion the evidence introduced by the plaintiff is insufficient in matter of law to sustain a verdict, may be followed, under Rev. Stat. Sec. 914, in the Circuit Court of the United States held within that state; and a judgment of nonsuit rendered accordingly, upon a ruling in matter of law duly excepted to, may be reviewed by this court on writ of error.

A corporation, formed by articles of association, called a certificate or charter, under the general laws of Pennsylvania concerning manufacturing companies, with a certain capital stock, for twenty years, for "the transportation of passengers in railroad cars constructed and owned by the said company" under certain patents, carried on the business of manufacturing sleeping cars under its patents, and of hiring or letting the cars to railroad companies by written contracts, receiving a revenue from the sale of berths and accommodations to passengers. Seven years afterwards, by a special act of the Legislature of Pennsylvania, the charter was extended for ninety-nine years, and the corporation was empowered to double its capital stock, and "to enter into contracts with corporations of this or any other state for the leasing or hiring and transfer to them, or any of them, of its railway cars and other personal property." The corporation forthwith entered into an indenture with a corporation of another state engaged in a similar business, by which it leased and transferred to that corporation all its cars, railroad contracts, patent rights and other personal property, moneys, credits and rights of action, for the term of ninety-nine years, except so far as the contracts and patents should expire sooner, and covenanted not to "engage in the business of manufactur-

ing, using or hiring sleeping cars" while the indenture should remain in force; and the lessee covenanted to pay all existing debts of the lessor, and to pay to the lessor annually the sum of $264,000, during the entire term of ninety-nine years, unless the indenture should be sooner terminated as therein provided. *Held*, That this contract was unlawful and void, because beyond the corporate powers of the lessor, and involving an abandonment of its duty to the public; and therefore no action could be maintained by the lessor upon the contract, or to recover the sums thereby payable, even while the lessee had enjoyed the benefits of the contract.

This was an action of covenant, brought September 21, 1886, by the Central Transportation Company, a corporation of Pennsylvania, against Pullman's Palace Car Company, a corporation of Illinois, to recover the sum of $198,000, due for the last three quarters of the year ending July 1, 1886, according to the terms of an indenture of lease from the plaintiff of all its personal property to the defendant, dated February 17, 1870, and set forth in full in the declaration.

The defendant filed several pleas, one of which was "that said indenture of lease was void in law as between the parties thereto, for the want of authority and corporate power on the part of the parties thereto to make and enter into said indenture of lease; and for that the same was in excess and in violation of the charters conferring the corporate powers on said plaintiff, and of the purpose of their incorporation." The plaintiff filed a replication, traversing the averments of this plea. * * *

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the court.

The principal defense in this case, duly made by the defendant, by formal plea, as well as by objection to the plaintiff's evidence, and sustained by the Circuit Court, was that the indenture of lease sued on was void in law, because beyond the powers of each of the corporations by and between whom it was made.

There is a preliminary question of practice, arising out of the manner in which the case was disposed of below, which is deserving of notice, although not mentioned by counsel in argument.

The Circuit Court, in ordering a nonsuit because in its opinion the evidence offered by the plaintiff was insufficient in law to maintain the action, acted in accordance with the statute of Pennsylvania, which provides that "it shall be lawful for the judge presiding at the trial to order a judgment of nonsuit to be entered, if in his opinion the plaintiff shall have given no such evidence as in law is sufficient to maintain the action, with leave, nevertheless, to move the court *in banc* to set aside such judgment of nonsuit; and in case the said court *in banc* shall refuse to set aside the nonsuit, the plaintiff may remove the record by writ of error into the Supreme Court for revision and review, in like manner and with like effect as he might remove a judgment rendered against him upon a demurrer to evidence." Penn. Stats. March 11, 1836, c. 34, Sec. 7; March 11, 1875, c. 8; 2 Purdon's Digest (11th ed.) 1362, 1363.

Under that statute, as expounded by Chief Justice GIBSON, the judge can order a nonsuit, only when all the evidence introduced, with every inference of fact that a jury might draw from it in favor of the plaintiff, appears to be insufficient in matter of law to sustain a verdict; and the defendant's motion for a nonsuit is equivalent to a demurrer to evidence, differing only in the judgment thereon not being a final determination of the rights of the parties, for if it is in favor of the plaintiff the case must be submitted to the jury, and if in favor of the defendant it is no bar to a new action. *Smyth v. Craig*, 3 Watts & Sergeant, 14; *Fleming v. Insurance Co.*, Brightly, 102; *Bournonville v. Goodall*, 10 Penn. St. 133.

It is true that a plaintiff, who appears by the record to have voluntarily become nonsuit, cannot sue out a writ of error. *United States v. Evans*, 5 Cranch, 280; *Evans v. Phillips*, 4 Wheat. 73; *Cossar v. Reed*, 17 Q.

B., 540. But in the case of a compulsory nonsuit it is otherwise; and a plaintiff, against whom a judgment of nonsuit has been rendered without his consent and against his objection, is entitled to relief by writ of error. *Elmore v. Grymes*, 1 Pet. 469; *Strother v. Hutchinson*, 4 Bing. N. C. 83; S. C. 5 Scott, 346; 6 Dowling, 238; *Voorhees v. Coombs*, 4 Vroom, 482.

There are many cases in the books, in which this court has held that a court of the United States had no power to order a nonsuit without the plaintiff's acquiescence. *Elmore v. Grymes*, above cited; *Crane v. Morris*, 6 Pet. 598, 609; *Silsby v. Foote*, 14 How. 218; *Castle v. Bullard*, 23 How. 172, 183. Yet, instead of overruling, upon that ground alone, exceptions to a refusal to order a nonsuit, this court, more than once, has considered and determined questions of law upon the decision of which the nonsuit was refused in the court below. *Crane v. Morris* and *Castle v. Bullard*, above cited.

The difference between a motion to order a nonsuit of the plaintiff and a motion to direct a verdict for the defendant is, as observed by Mr. Justice FIELD, delivering a recent opinion of this court, "rather a matter of form than of substance, except (that) in the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted, either upon motion or upon appeal." *Oscanyan v. Arms Co.*, 103 U. S. 261, 264.

Whether a defendant in an action at law may present in the one form or in the other, or by demurrer to the evidence, the defence that the plaintiff, upon his own case, shows no cause of action, is a question of "practice, pleadings, and forms and modes of proceeding," as to which the courts of the United States are now required by the act of Congress of June 1, 1872, c. 255, Sec. 5, (17 Stat. 197,) reenacted in Sec. 914 of the Revised Statutes, to conform, as near as may be, to those existing in the courts of the State within which the trial is had. *Sawin v. Kenny*, 93 U. S. 289; *Ex parte Boyd*, 105 U. S. 647; *Chateaugay Co. peti-*

tioner, 128 U. S. 544; *Glenn v. Sumner*, 132 U. S. 152, 156.

It is doubtless within the authority of the presiding judge, and is often more convenient, in order to prevent the case from being brought up in such a form that the judgment of the court of last resort will not finally determine the rights of the parties, to adopt the course of directing a verdict for the defendant and entering judgment thereon.

But the judgment of nonsuit, being a final judgment disposing of the particular case, and rendered upon a ruling in matter of law duly excepted to by the plaintiff, is subject to be reviewed in this court by writ of error.

It was therefore rightly assumed by the counsel of both parties at the argument that the only question to be determined is of the correctness of the ruling sustaining the defense of *ultra vires*, independently of the form in which that question was presented and disposed of.

Upon the authority and the duty of a corporation to exercise the powers granted to it by the legislature, and those only; and upon the invalidity of any contract, made beyond those powers, or providing for their disuse or alienation; there is no occasion to refer to decisions of other courts, because the judgments of this court, especially those delivered by Justice MILLER, afford satisfactory guides and ample illustrations.

The earliest case in this court, which touches the subject, is *York v. Maryland Railroad v. Winans*, decided at December term, 1854, in which a railroad corporation unsuccessfully tried to escape liability for an unlicensed use of the plaintiff's patent in cars run over its road, upon the ground that the cars were constructed, owned and used by another corporation under a contract with the defendant. Mr. Justice CAMPBELL delivering judgment said; "Important franchises were conferred upon the corporation to enable it to provide the facilities to communication and intercourse, required for the public convenience. Corporate manage-

ment and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a renumeration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations, without the consent of the legislature." 17 How. 30, 39.

In *Pearce v. Madison & Indianapolis Railroad*, at December term, 1858, it was adjudged that two corporations, chartered by the State of Indiana to construct and manage distinct, though connecting railroads, had no power to consolidate themselves into one corporation, or to establish a connecting steamboat line on the Ohio River, and therefore were not liable to be sued upon a promissory note which they had given in payment for a steamboat. The same justice, in delivering the opinion of the court, stated the reasons for the decision as follows: "The rights, duties and obligations of the defendants are defined in the acts of the legislature of Indiana under which they were organized, and reference must be had to these, to ascertain the validity of their contracts. They empower the defendants respectively to do all that was necessary to construct and put in operation a railroad between the cities which are named in the acts of incorporation. There was no authority of law to consolidate these corporations, and to place both under the same management, or to subject the capital of the one to answer for the liabilities of the other; and so the courts of Indiana have determined. But, in addition to that act of illegality, the managers of these corporations established a steamboat line to run in connection with the railroads, and thereby diverted their capital from the objects contemplated by their charters, and exposed it to perils for which they afforded no sanction. Now, persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment, and

the public have an interest that neither the managers nor stockholders of the corporations shall transcend their authority." 21 How. 441–443.

In *Zabriskie v. Cleveland &c. Railroad*, at December term, 1859, this court, again speaking by the same justice, while affirming and acting on the principle that a corporation may be bound by the conduct and representations of its directors in "those cases in which a corporation acts within the range of its general authority, but fails to comply with some formality or regulation which it should not have neglected, but which it has chosen to disregard," took the precaution to observe: "This principle does not impugn the doctrine that a corporation cannot vary from the object of its creation, and that persons dealing with a company must take notice of whatever is contained in the law of their organization. This doctrine has been constantly affirmed in this court." 23 How. 381, 398.

In *Thomas v. Railroad Co.*, 101 U. S. 71, decided at October term, 1879, it was adjudged that a lease for twenty years by a railroad corporation of its railroad, rolling stock and franchises, in consideration of being paid one half of the gross sums collected from the operation of the road by the lessees during the term, and reserving to the lessor a right to terminate the lease and retake possession of the road at any time, paying to the lessees the value of the unexpired term, was void; and that the corporation upon terminating the lease and resuming possession when the lessees had been in possession five years, and the accounts of the parties for those years having been adjusted and paid, was not liable to an action by the lessees to recover the value of the unexpired term; and Mr. Justice MILLER, in the course of delivering judgment, said:

"The authority to make this lease is placed by counsel primarily in the following language of the thirteenth section of the company's charter: 'That it shall be lawful for the said company, at

any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kind of goods, produce, merchandise, freight or passengers, and to enforce the fulfilment of such contracts.' This is no more than saying 'you may do the business of carrying goods and passengers, and may make contracts for doing that business. Such contracts you may make with any other corporation or with individuals.' No doubt a contract by which the goods, received from railroad or other carrying companies, should be carried over the road of this company, or by which goods or passengers from this road should be carried by other railroads, whether connecting immediately with them or not, are within this power, and are probably the main object of the clause. But it is impossible, under any sound rule of construction, to find in the language used a permission to sell, lease or transfer to others the entire road, and the rights and franchises of the corporation. To do so is to deprive the company of the power of making those contracts which this clause confers, and of performing the duties which it implies." 101 U. S. 80. "The authority to build a railroad and to contract for carrying passengers and goods over it and other roads is no authority to lease it, and with the lease to part with all its powers to another company or to individuals." 101 U. S. 81.

"The powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as such granted as what is expressed, it remains, that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." 101 U. S. 82.

"There is another principle of equal importance, and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires*, as we have just discussed it, shows very

clearly that the railroad company was without the power to make such a contract. That principle is, that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy." 101 U. S. 83.

It was also held in that case that the lease was not made valid by a subsequent act of the legislature, regulating the rates of fares and freights to be charged by "the directors, lessees or agents of said railroad;" the Court saying: "It is not by such an incidental use of the word 'lessees' in an effort to make sure that all who collected fares should be bound by the law, that a contract unauthorized by the charter, and forbidden by public policy, is to be made valid and ratified by the State." 101 U. S. 85.

In *Branch v. Jesup*, Mr. Justice BRADLEY delivering judgment said: "Generally the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad company; and does not extend to the sale of the railroad itself, or of the franchises connected therewith. Outlying lands, not needed for railroad uses, may be sold. Machinery and other personal property may be sold. But the road and franchises are generally inalienable; and they are so, not only because they are acquired by legislative grant, or in the exercise of special authority given, for the specific purposes of the incorporating act, but because they are essential to the fulfilment of those purposes; and it would be a dereliction of the duty owed by the corporation to the State and to the public to part with them." And a lease from one railroad

corporation to another was upheld in that case, only because the lessor had by its charter express authority not only to purchase, hold and convey property, real and personal, and to connect its road with any other road, but also to incorporate its stock with that of any other company, which, it was observed, "contemplates not only the possible transfer of the railroad and its franchises to another company, but even the extinguishment of the corporation itself, and its absorption into a different organization. The greater power of alienating or extinguishing all its franchises, including its own being and existence, contains the lesser power of alienating its road and the franchises incident thereto and necessary to its operation. Its power of alienation and sale extends to a class of subjects to which it does not ordinarily apply." 106 U. S. 468, 478, 479.

In *Pennsylvania Railroad v. St. Louis &c. Railroad*, the same principles were reaffirmed; and the court, again speaking by Mr. Justice MILLER, after referring to some of the previous decisions on the subject in this and other courts, stated, "as the just result of these cases and on sound principle, that unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises and the exercise of its powers; nor can any other railroad company without similar authority make a contract to receive and operate such road, franchise and property of the first corporation; and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter."

In that case it was held that a lease for ninety-nine years of a railroad in Illinois and Indiana from a railroad corporation of Illinois to a railroad corporation of Indiana, whose road connected with the road leased, was within the authority conferred on the lessor by

the statute of Illinois, which empowered all railroad corporations of that State to make "contracts and arrangements with each other, and with railroad corporations of other States, for leasing or running their roads, or any part thereof;" yet was unlawful and void, because beyond the authority conferred upon the lessee by the statute of Indiana, empowering any railroad corporation of that State, whose road connected with a railroad in an adjoining State, "to make such contracts and agreements with any such road constructed in an adjoining State, for the transportation of freight and passengers, or for the use of its said road, as to the board of directors may seem proper;" the court saying that it could not "see in this provision any authority to make contracts beyond those which relate to forwarding by one company the passengers and freight of another, on terms to be agreed on, and possibly for the use of the road of one company in running the cars of the other over it to its destination without breaking bulk." 118 U. S. 290, 309, 312, 630.

In another case, decided about the same time, the same justice, in delivering an opinion by which a corporation was held to be liable for a tort done by its agents in the course of its business and of their employment, although in excess of its powers, observed: "The question of the liability of corporations on contracts which the law does not authorize them to make, and which are wholly beyond the scope of their powers, is governed by a different principle. Here the party dealing with the corporation is under no obligation to enter into the contract. No force, or restraint, or fraud is practiced on him. The powers of these corporations are matters of public law open to his examination, and he may and must judge for himself as to the power of the corporation to bind itself by the proposed agreement." *Salt Lake City v. Hollister*, 118 U. S. 256, 263.

In *Willamette Co. v. Bank of British Columbia*, 119 U. S. 191, cited for the plaintiff, a corporation char-

tered "for the purpose of creating and improving water power and privileges," and authorized to bring water from a river, was also expressly authorized by its charter to "use, rent or sell" "the exclusive right to the hydraulic power and privileges created by the water" so taken, and for that reason only was held by this court, speaking by the same justice, to have the power to mortgage such right, power and privileges.

In *Green Bay & Minnesota Railroad v. Union Steamboat Co.*, 107 U. S. 98, and in *Pittsburgh &c. Railway v. Keokuk & Hamilton Bridge*, 131 U. S. 371, 384, the general doctrine of *ultra vires*, as established by earlier decisions, was affirmed; and a railroad corporation was held to have the power, for the purpose of securing a continuous line of transportation of which its road formed part, to make a contract with a steamboat company, or with a company chartered to construct a railway bridge or viaduct, because the charter of the particular railroad corporation, read in connection with the general laws applicable to it, clearly manifested the intention of the legislature to confer upon it that power.

In *Oregon Railway v. Oregonian Railway*, 130 U. S., 1, it was held that a general law of Oregon, authorizing companies to organize themselves by written articles of association filed with the Secretary of State for "any lawful enterprise, business, pursuit or occupation" specified in the articles, including "making or constructing any railroad," and "to purchase, possess and dispose of such real and personal property as may be necessary and convenient to carry into effect the object of the incorporation," did not authorize a railroad corporation to be incorporated, either for leasing its railroad to another corporation, or for taking leases from other corporations of their roads, although these objects were included in its articles of association; and therefore that, without further and express authority from the legitsature, a lease of ninety-six years from one railroad corporation of its whole road and franchises to another such corporation was utterly

void, and would not sustain an action by the lessor against the lessee to recover the rent stipulated in the lease.

It was also held in that case, in accordance with the decision in *Thomas v. Railroad Co.*, that no authority to make such a lease could be implied from a special act passed by the Oregon legislature before the lease, granting to the plaintiff corporation rights, privileges and easements, for wharves, stations and tracks, in certain public grounds and streets; with a proviso that said corporation "or its assigns" should have no power to sell, convey or assign the rights so granted to any person or corporation, save only with and as part of its railway; and the reasons for so holding appear in the following extracts from the opinion of the court, delivered by Mr. Justice MILLER:

"One of the most important powers with which a corporation can be invested is the right to sell out its whole property together with the franchises under which it is operated, or the authority to lease its property for a long term of years. In the case of a railroad company, these privileges, next to the right to build and operate its railroad, would be the most important which could be given it, and this idea would impress itself upon the legislature. Naturally, we would look for the authority to do these things in some express provision of law. We would suppose that if the legislature saw fit to confer such rights, it would do so in terms which could not be misunderstood. To infer, on the contrary, that it either intended to confer them or to recognize that they already existed, by the simple use of the word 'assigns,' a very loose and indefinite term, is a stretch of the power of the court in making implications which we do not feel to be justified." 130 U. S. 30.

"The object of the legislature in making the proviso to that statute was to make sure that the grant given to the Oregonian Company of terminal facilities, as they are called, with the right to wharves, depots and access to the river for the use of the road, should

never be separated by sale, assignment or otherwise from the road itself, and that into whosesoever hands the road went should also go the rights, powers and privileges conveyed by the grant." 130 U. S. 32.

It was further held that a provision of the general laws of Oregon, authorizing any corporation, by a vote of a majority of its stockholders, to dissolve itself, and thereupon to settle its business, dispose of its property and divide its capital stock, did not confer upon it any authority, while continuing in existence, to dispose of by conveyance or lease its road and its corporate powers and franchises. 130 U. S., 34, 35.

The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds; the obligations of every one contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law. A corporation cannot, without the assent of the legislature transfer its franchise to another corporation, and abnegate the performance of the duties to the public, imposed upon it by its charter as the consideration for the grant of its franchise. Neither the grant of a franchise to transport passengers, nor a general authority to sell and dispose of property, empowers the grantee, while it continues to exist as a corporation, to sell or to lease its entire property and franchises to another corporation. These principles apply equally to companies incorporated by special charter from the legislature, and to those formed by articles of association under general laws.

By a familiar rule, every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public; because an intention, on the part of the government, to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily to be implied in the terms of the grant; and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee: and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544–548; *Dubuque & Pacific Railroad v. Litchfield*, 23 How. 66, 88, 89; *Slidell v. Grandjean*, 111 U. S. 412, 437, 438. This rule applies with peculiar force to articles of association, which are framed under general laws, and which are a substitute for a legislative charter, and assume and define the powers of the corporation by the mere act of the associates, without any supervision of the legislature or of any public authority. *Oregon Railway v. Oregonian Railway*, 130 U. S. 26, 27.

In the case at bar, the plaintiff was originally incorporated for twenty years from December 26, 1862, with a capital stock of $200,000, by articles of association, called a certificate or charter, under general laws of Pennsylvania. It is not without significance, that those laws required its stock, property and affairs to be managed by a board of directors, a majority of whom should be stockholders therein, and citizens of the State; and forbade it to use any part of its capital stock in the purchase of stock of any other corporation. Those laws related to manufacturing companies only. But the purpose of its incorporation, as stated in the charter, was "the transportation of passengers

in railroad cars constructed and to be owned by the said company" under certain patents. And, as appears by the recitals in the indenture sued on, the plaintiff carried on the business of manufacturing sleeping cars under its patents, and of hiring or letting those cars to railroad companies by written contracts, receiving a revenue from the sale of berths and accommodations to passengers.

The validity of the plaintiff's incorporation, as well as its power to make that indenture, however, depends not solely upon the original charter and the general laws under which it came into existence, but mainly upon a special act of the legislature of Pennsylvania of February 9, 1870. By this act, the validity of the charter for the object therein named was clearly recognized; the charter was extended for ninety-nine years, nearly fivefold the period for which the corporation was or could have been formed under general laws; and the corporation was expressly empowered to double its capital stock, and "to enter into contracts with corporations of this or any other State for the leasing or hiring and transfer to them, or any of them," of its "railway cars and other personal property."

The plaintiff, therefore, was not an ordinary manufacturing corporation, such as might, like a partnership or an individual engaged in manufactures, sell or lease all its property to another corporation. *Ardesco Oil Co. v. North American Oil Co.*, 66 Penn. St. 375; *Treadwell v. Salisbury Manuf. Co.* 7 Gray, 393. But the purpose of its incorporation, as defined in its charter, and recognized and confirmed by the legislature, being the transportation of passengers, the plaintiff exercised a public employment, and was charged with the duty of accommodating the public in the line of that employment, exactly corresponding to the duty which a railroad corporation or a steamboat company, as a carrier of passengers, owes to the public, independently of possessing any right of eminent domain. The public nature of that duty was not affected by the fact that it was to be performed by means of cars con-

structed and of patent rights owned by the corporation, and over roads owned by others. The plaintiff was not a strictly private, but a quasi public corporation; and it must be so treated as regards the validity of any attempt on its part to absolve itself from the performance of those duties to the public, the performance of which by the corporation itself was the remuneration that it was required by law to make to the public in return for the grant of its franchise. *Pichard v. Pullman Southern Car Co.*, 117 U. S. 34; *York & Maryland Railroad v. Winans*, 17 How. 30, 39; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397.

The evideat purpose of the legislature, in passing the statute of 1870, was to enable the plaintiff the better to perform its duties to the public, by prolonging its existence, doubling its capital, and confirming, if not enlarging, its powers. An intention that it should immediately abdicate those powers, and cease to perform those duties, is so inconsistent with that purpose, that it cannot be implied, without much clearer expressions of the legislative will looking towards that end, than are to be found in this statute.

The provision of this statute, by which the plaintiff is empowered to contract with other corporations "for the leasing or hiring and transfer to them, or any of them," of its "railway cars and other personal property," is fully satisfied by construing it as confirming the plaintiff's right to do as it had been doing, to "lease" or "hire" (which are equivalent words) to other corporations in the regular course of its business, and to "transfer" under such leasing or hiring, its "railway cars," and "other personal property," either connected with the cars, or at least of the same general nature of tangible property. It can hardly be stretched to warrant the plaintiff in making to a single corporation an absolute transfer, or a long lease, of all that might be comprehended in the words "personal property" in their widest sense, including not only

goods and chattels, but moneys, credits and rights of action. In any view, it would be inconsistent alike with the main purpose of the statute, and with the uniform course of decision in this court, to construe these words as authorizing the plaintiff to deprive itself, either absolutely, or for a long period of time, of the right to exercise the franchise granted to it by the legislature for the accommodation of the public.

By the contract between these parties, as expressed in the indenture sued on, are transferred all cars already constructed, all existing contracts with railroad companies for running cars, all existing patent rights under which other cars might be constructed, and all other personal property, moneys, credits and rights of action of the plaintiff. But after the cars and the railroad contracts may have ceased to exist, and after all those patent rights must have expired, the indenture is still to continue in force for the full term of ninety-nine years, unless sooner terminated as therein provided. In addition to all this, the plaintiff covenants, in the most express and positive terms, never to "engage in the business of manufacturing, using or hiring sleeping cars" while the indenture remains in force. In short, the plaintiff not only parts with all its means of carrying on the business, and of performing the duty, for which it had been chartered, of transporting passengers and making and letting cars to transport them in; but it undertakes to transfer, for ninety-nine years, nearly coextensive with the duration of its own corporate existence, the whole conduct of its business, and the performance of all its public duties, to another corporation; and to continue in existence, during that period, for no other purpose than that of receiving, from time to time, from the other corporation, the stipulated rent or compensation, and of making dividends out of the moneys so received.

Considering the long term of the indenture, the perishable nature of the property transferred, the large sums to be paid quarterly by the defendant by way of compensation, its assumption of the plaintiff's debts,

and the frank avowal, in the indenture itself, of the intention of the two corporations to prevent competition and to create a monopoly, there can be no doubt that the chief consideration for the sums to be paid by the defendant was the plaintiff's covenant not to engage in the business of manufacturing, using or hiring sleeping cars; and that the real purpose of the transaction was, under the guise of a lease of personal property, to transfer to the defendant nearly the whole corporate franchise of the plaintiff, and to continue the plaintiff's existence for the single purpose of receiving compensation for not performing its duties.

The necessary conclusion from these premises is that the contract sued on was unlawful and void, because it was beyond the powers conferred upon the plaintiff by the legislature, and because it involved an abandonment by the plaintiff of its duty to the public.

There is strong ground, also, for holding that the contract between the parties is void, because in unreasonable restraint of trade, and therefore contrary to public policy. Of the cases cited by the plaintiff upon this point, those which have most resemblance to the present case are quite distinguishable.

A covenant by the assignor of letters patent for an invention, that he will not himself make, use or sell the patented article, is undoubtedly valid, because the act of Congress which creates the monopoly expressly authorizes it to be assigned as a whole. Rev. Stat. Secs. 4884, 4898; *Gayler v. Wilder*, 10 How. 477, 494; *More Co. v. Morse*, 103 Mass., 73. But this plaintiff's transfer and covenant, as we have seen, cover much more than patent rights, and are to continue in force long after the patent rights assigned must have expired.

Upon the sale of a secret process, a covenant, express or implied, that the seller will not use the process himself or communicate it to any other person, is lawful, because the process must be kept secret in order to be of any value, and the public has no interest in the question by whom it is used. *Fowle v.*

Park, 131 U. S. 88, 97; *Vickery v. Welch*, 19 Pick. 523, 527; *Peabody v. Norfolk*, 98 Mass. 452, 460.

A contract of a carrier, whether an individual or a corporation, not to carry passengers or goods over a particular route, may be reasonable and valid. *Peirce v. Fuller*, 8 Mass. 223; *Palmer v. Stebbins*, 3 Pick. 188; *Leslie v. Lorillard*, 110 N. Y., 519. But a contract by which a corporation, chartered to perform the duties of a common carrier, or any other duties to the public, agrees that it will not perform those duties at all, anywhere, for ninety-nine years, is clearly unreasonable and void. *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64; *Gibbs v. Baltimore Gas Co.* 130 U. S. 396, 408-410.

This case strikingly illustrates several of the obvious considerations for holding contracts in restraint of trade to be unreasonable and void, as compactly and forcibly stated by Mr. Justice MORTON in the leading case of *Alger v. Thacher:* "They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves." "They prevent competition and enhance prices." "They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business and engross the market." 19 Pick. 51, 54.

But this objection, as applied to the facts of this case, so closely connects itself with the objection more distinctly pleaded, and already discussed at length, that it requires no further separate consideration.

The contract sued on being clearly beyond the powers of the plaintiff corporation, it is unnecessary to determine whether it is also *ultra vires* of the defendant, because, in order to bind either party, it must be within the corporate powers of both. *Thomas v. Railroad Co.*, *Pennsylvania Railroad v. St. Louis &c. Railroad*, and *Oregon Railway v. Oregonian Railway*, above cited.

It was argued in behalf of the plaintiff that, even if the contract sued on was void, because *ultra vires* and against public policy yet, that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant, for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defence to this action to recover the compensation agreed on for that period.

But this argument, though sustained by decisions in some of the states finds no support in the judgments of this court.

The passages cited by the plaintiff from *Railway Co. v. McCarthy*, 96 U. S. 258, 267, and *San Antonio v. Mehaffy*, 96 U. S. 312, 315, are no more than a passing remark that "the doctrine of *ultra vires* when invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice or work a legal wrong," and a repetition in substance, of the same remark, adding "if such a result can be avoided".

In *Thomas v. Railroad Co.*, already cited, Mr. Justice MILLER, while admitting in general terms that "in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the property or the money so transferred", and that "the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it", yet in the same connection, and in the most emphatic words, said that in the case before the court, of a contract forbidden by public policy and beyond the powers of the defendant corporation, it was its legal duty, a duty both to its stockholders and to the public, to rescind and abandon the contract of the earliest moment and the performance of that duty, though delayed for several years was a rightful act when done, and could give the other party

no right of action; and that to hold otherwise would be "to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts." 101 U. S. 86.

In an earlier part of the same opinion and again in *Oregon Railway v. Oregonian Railway*, he referred with approval to the decision of the House of Lords in *Asbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653, by which, as he observed, "the broad doctrine was established that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action." 101 U. S. 83; 130 U. S. 22.

In **Union Trust Co. v. Illinois Midland Co.** 117 U. S. 434, *after one railroad corporation had purchased of two others their connecting railroads and their franchises, a receiver had been appointed of all its property, including the three railroads, and, under the direction of the court, and without objection by any of the parties interested, had for years administered the whole as a unit, and incurred expenses and issued certificates accordingly.* **It was held that the holders of bonds secured by mortgage of one of the purchased railroads could not, for want of affirmative legislative authority for the sale and purchase of that road, claim a priority of lien upon it as against the holders of certificates issued by the receiver for necessary and proper expenses of the whole line; and this court, as declared in its opinion delivered by Mr. Justice Blatchford, rested this conclusion "on the principle that nonaction on the part of the bondholders and their trustee which allowed the court and the receivers to go on during the entire litigation contracting debts in respect to the**

whole line operated as a unit, and administering the property as one, under circumstances where, as shown, it was and is impossible to separate the interests, as to expenditures and benefits, in respect to the matters now questioned, and where important rights have accrued on the faith of the unity of the interests, amount to such acquiesence as should operate as an ESTOPPEL." (117 U. S. 467-469). The court, in that case, in no way maintained any suit on the contract supposed to be unlawful but simply refused to set it aside at the demand of parties, by reason of whose silence, and omission to seasonably interpose any objection it had been acted upon as valid throughout a long course of judicial proceedings.

The distinction is clearly brought out in **Pennsylvania Railroad v. St. Louis, &c., Railroad,** above cited, in which it was argued, substantially as in the present case, that, although the contract of lease might be void, so that no action could originally have been maintained upon it, yet there had been for years such performance of it, in the use, possession and control by the defendants of the plaintiff's road and franchise that they could not now be permitted to repudiate or abandon it; and that **the case came within that class in which it had been held that, where a contract has been so far executed that property has passed and rights have been acquired under it, the courts will not disturb the possession of such property, or compel restitution of money received under such a contract.** In answering that objection, Mr. Justice MILLER speaking for the court, said: **"Undoubtedly there are such decisions in courts of high authority and there is such a principle, very sound in its application to appropriate cases.** But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and

that neither what has been done under it, nor the action of the court, can infuse any vitality into it. Looking at the case as one where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands." And whether, in the case then before the court, the lessee might be liable to the lessor as on a *quantum meruit*, for the use of its road, was not decided, because not presented. 118 U. S. 316–18.

In *Salt Lake City v. Hollister*, above cited, it was said that, in cases of contracts upon which corporations could not be sued because they were *ultra vires*, "the courts have gone a long way to enable parties who have parted with property or money on the faith of such contracts, to obtain justice by recovery of the property or the money specifically, or as money had and received to the plaintiff's use." 118 U. S. 263.

The true ground of relief in such cases is clearly shown in a line of opinions, two of which were cited by Mr. Justice MILLER in support of the proposition just quoted, in which municipal corporations, having received money or property under contracts so far beyond their powers as not to be capable of being enforced or sued on according to their terms have been held, while not liable to pay according to the contracts, to be bound to account for the money or property which they had received.

Thus, in *Hitchcock* v. *Galveston*, 96 U. S. 341, 350, where a city was sued for damages for putting an end to a contract with the plaintiffs for the improvement of its sidewalks, the only invalid part of which was its promise to pay in bonds, which it was beyond its powers to issue, it was decided that the invalidity of that promise was no reason why the city should not pay for the benefits which it had received from the plaintiff's performance of the contract, Mr. Justice STRONG, in behalf of the court, saying: "It matters not that the promise was to pay in a manner not

authorized by law. If payments cannot be made in bonds, because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all.

So in *Louisiana v. Wood*, 102 U. S. 294, 299, a city, which had received money for bonds issued by it without authority and at an illegal rate of interest and purchased by the plaintiff, was held liable, not on any contract of purchase, nor on any express contract whatever, but on a contract implied from its recept of the money, Chief Justice WAITE saying: "There was no actual sale of bonds, because there were no valid bonds to sell. There was no express contract of borrowing and lending and consequently no express contrict to pay any rate of interest at all. The only contract actually entered into is the one the law implies from what was done, to wit, that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied. That contract the plaintiffs seek to enforce in this action, and no other."

Again, in *Parkersbury v. Brown*, 106 U. S. 487, 503, where individuals, in consideration of bonds issued to them by a city for a purpose beyond its powers, executed to the city a trust deed, in the nature of a mortgage, to secure the payment of the bonds and interest, it was held that the bonds could not be enforced against the city, but that the mortgagors had a right to reclaim the property and demand an account of the city; and Mr. Justice BLATCHFORD, in delivering judgment, said: "The enforcement of such right is not in affirmance of the illegal contract but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act. There was no illegality in the mere putting of the property by the O'Brien's [the mortgagors] in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal

contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a cantract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case, the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received."

The case of *Chapman* v. *Douglas County*, in which the opinion was delivered by Mr. Justice MATTHEWS, is to the same effect. 107 U. S. 348, 355 & *seq.*

In Pittsburgh &c. Railway v. *Keokuk & Hamilton Bridge*, it was stated, as the result of the previous cases in this court, that " a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid, but the proper remedy of the party aggrieved is by disaffirming the contract and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received the benefit of." 131 U. S. 371, 389.

The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows :

A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

When a coporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting

with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws.

The doctrine of the common law, by which a tenant of real estate is estopped to deny his landlord's title, has never been considered by this court as applicable to leases by railroad corporations of their roads and franchises. It certainly has no bearing upon the question whether this defendant may set up that the lease sued on, which is not of real estate, but of personal property, and which includes, as inseparable from the other property transferred, the inalienable franchise of the plaintiff, is unlawful and void, for want of legal capacity in the plaintiff to make it.

A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.

In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.

The ground and the limits of the rule concerning the remedy, in the case of a contract *ultra vires*, which has been properly performed, and under which prop-

erty has passed, can hardly be summed up better than they were by Mr. Justice MILLER in a passage already quoted, where he said that the rule "stands upon the broad ground that the contract itself is void, and that nothing which has been done under it, nor the action of the court, can infuse any vitality into it;" and that "where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands." *Pennsylvania Railroad* v. *St. Louis &c. Railroad*, 118 U. S. 317.

Whether this plaintiff could maintain any action against this defendant, in the nature of a *quantum meruit*, or otherwise, independently of the contract, need not be considered, because it is not presented by this record and has not been argued. This action, according to the declaration and the evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant is not liable for.

Judgment affirmed.

Mr. Justice BROWN, not having been a member of the court when this case was argued, took no part in its decision.

[171 U. S. 138.]

Pullman's Palace Car Company v. Central Transportation Company.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FROM THE EASTERN DISTRICT OF PENNSYLVANIA; AND ALSO CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 141. Argued March 24, 25, 1898.—Decided May 31, 1898.

By taking an appeal to the Circuit Court of Appeals the Pullman Company did not, under the peculiar circumstances of this case, waive its right to appeal to this court, and the case being now before this court either on appeal or by the writ of *certiorari*, it has jurisdiction.

In order to authorize a denial of a plaintiff's motion to discontinue a suit in equity, there must be some plain legal prejudice to the defendant, other than the mere prospect of future litigation, rendered possible by the discontinuance.

Unless there be an obvious violation of a fundamental rule of a court of equity, or an abuse of the discretion of the court, the decision of a motion for leave to discontinue will not be reviewed here.

The decision of the Circuit Court in denying the motion of the Pullman Company to discontinue its suit was right, as was also its decision permitting the Central Company to file a cross bill.

In no way, and through no channels, directly or indirectly, will courts allow an action to be maintained for the recovery of property delivered under an illegal contract, where, in order to maintain such recovery, it is necessary to have recourse to that contract; but the right of recovery must rest on a disaffirmance of the contract, and is permitted only because of the desire of courts to do justice, as far as possible to the party who has made payment or delivered property under a void agreement, which in justice he ought to recover, and no recovery will be permitted which will weaken said rule founded upon the principles of public policy.

Acting upon those settled principles the court decides:

(1) That the Central Company is entitled to recover from the Pullman Company the value of the property transferred by it to that company when the lease took effect, with interest, as that property has substantially disappeared, and cannot now be returned;

(2) That the value of that property is not to be ascertained from the market value of the shares of the Central Company's stock at that time, but by the value of the property transferred;

(3) That the value of the contracts with railroad companies transferred by the Central Company form no part of the sum which it is entitled to recover;

(4) That the same principle applies to the patents transferred which had all expired;

(5) That it is not entitled to recover anything for the breaking up of its business by reason of the contracts being adjudged illegal.

The record in this case shows that in 1870 the Central Transportation Company, hereafter called the Central Company, was a corporation which had been in 1862 incorporated under the general manufacturing laws of the State of Pennsylvania. It was engaged in the business of operating railway sleeping cars and of hiring them to railroad companies under written contracts by which the cars were to be used by the railroad companies for the purpose of furnishing sleeping conveniences to travellers. The corporation at this time had contracts with a number of different railroad companies in the East, principally, but not exclusively, with what is known as the Pennsylvania Railroad system, and it had been engaged in its business with those companies for some time prior to 1870. In the year last named the Pullman's Palace Car Company, hereafter called the Pullman Company, was a corporation which had been incorporated under the laws of the State of Illinois. It was doing the same general kind of business in the West that the Central Company was doing in the East. For reasons not material to detail, the two companies entered into an agreement of lease, which was executed February 17, 1870.

By its terms the Central Company leased to the

Pullman Company its entire plant and personal property together with its contracts which it had with railroad companies for the use of its sleeping cars on their road, and also the patents belonging to it. The lease was to run for ninety-nine years, which was the duration of the charter of the Central Company.

It was also agreed that the Central Company would not engage in the business of manufacturing, using or hiring sleeping cars while the contract remained in force.

In consideration of these various obligations, the Pullman Company agreed to pay annually the sum of $264,000 during the entire term of ninety-nine years, in quarterly payments, the first quarter's payment to be made on the 1st of April, 1870.

From the time of the execution of the contract its terms were carried out, and no particular trouble occurred between the companies for about fifteen years. During this time and up to the 27th day of January, 1885, the Pullman Company paid to the Central Company, as rent under the contract, the sum of $3,960,000, without any computation of interest. About or just prior to January, 1885, differences arose between the companies. The Pullman Company claimed the right to terminate the contract under the eighth clause thereof, or else to pay a much smaller rent. The merits of the controversy are not material.

The two companies not agreeing, and the Pullman Company refusing to pay the rent stipulated for in the lease, the Central Company brought successive actions to recover the instalments of rent accruing. In one of them the Pullman Company pleaded the illegality of the lease, as being *ultra vires* the charter of the Central Company. The plea prevailed in the trial court, and upon the writ of error the judgment upholding this defence was, in March, 1891, sustained in this court. *Central Transportation Company v. Pullman's Car Company*, 139 U. S. 24.

After the bringing of several actions for instalments of rent by the Central Company and before the ques-

tion of *ultra vires* had been argued in this court, the Pullman Company on the 25th day of January, 1887, commenced this suit by the filing of its bill against the Central Company in the Circuit Court of the United States for the Eastern District of Pennsylvania. The bill asked for an injunction to restrain the bringing of more suits for rent. It gave a general history of the transactions between the companies from the execution of the contract between them in February, 1870, down to the time of the filing of the bill, and it alleged the election of the Pullman Company to terminate the lease under the provisions of the eighth clause thereof, and the willingness of the company to pay what should be found by the court to be equitable and right to the Central Company on account of the property which had been transferred by that company to it, and to this end it prayed the aid of the court. * * * *

After considerable proof had been taken upon the issues involved in this suit and after the decision of the other case in this court, in March, 1891, holding the lease illegal and void, the complainant herein, on the 25th of April, 1891, applied to the court for leave to dismiss its bill at its own cost. This application was opposed by the defendant, who, on the same day moved for leave to file a cross-bill, in which it said it would avail itself of the tenders of relief made by the complainant in its bill, and that it would pray such relief in its cross-bill as might be pertinent to the case made by the bill. In December, 1891, complainant's motion for leave to dismiss its bill was denied, and the defendant's motion for leave to file a cross-bill was granted. Thereupon the cross-bill was filed, in which the Central Company acknowledging, under the decision of this court, that the lease in question was void, claimed to avail itself of the tenders made in complainant's bill upon the subject of the return of its property and compensation for that which it was impossible to return, and claimed, among other things, that the Pullman Company should account for all the profits which it had derived since the making of the lease by the use

of the property transferred to it under the agreement, and that the amount found due should be paid to the Central Company, and that the Pullman Company should be adjudged to be a trustee for the Central Company of all the contracts for transportation whether original, new or renewals, held by the Pullman Company with railroad companies with which there were contracts of transportation with the Central Company at the time of the making of the lease in February, 1870, and that the Pullman Company should be adjudged to pay the Central Company all such sums as should be due to it by the Pullman Company as such trustee, and that defendant should in the future from time to time account for the sums which should be due by reason of future operations under those contracts. It also prayed for a discovery and an accounting by the Pullman Company of its use and disposition of the property turned over to it by the Central Company.

To this cross-bill the Pullman Company filed three demurrers. * * * *

The demurrers were overruled with leave to present the questions on final hearing, and the Pullman Company then answered the cross-bill. * * * *

The Pullman Company denied that it owed any duty to the cross-complainant, which was enforceable at law or equity, to return to the Central Company the property assigned under the lease or to account for any profits derived under and by reason of any property delivered to it under the agreement.

Testimony was taken under these pleadings, and the case came before the Circuit Court for final hearing, and that court held that the cross-complainant made out a case for an accounting by the cross-defendant for the value of the property when received, together with its earnings since, less the amount paid as rent. The court, therefore, referred it to a master for the purpose of ascertaining the facts, with directions to report within the time named in the order of reference. Under this order testimony was taken and the master

reported in favor of the Central Company, and the exceptions filed having been overruled, judgment was entered in favor of the Central Company for the sum of $4,235,044, together with costs. From this judgment the Pullman Company appealed directly to this court. * * *

Mr. Edward S. Isham and *Mr. Joseph H. Choate* for appellant. *Mr. A. H. Wintersteen* and *Mr. Robert T. Lincoln* were on their brief.

Mr. Frank P. Pritchard and *Mr. John G. Johnson* for appellee.

Mr. Justice PECKHAM, after stating the facts, delivered the opinion of the court.

The motion to dismiss the appeal in this case is now before the court.

Counsel for the Pullman Company took the appeal directly from the Circuit Court to this court on the theory that the case involved the construction or application of the Constitution of the United States, because of the holding of the court below that the cause of action alleged by the Central Company in its cross-bill was, under the circumstances, a proper subject of equitable cognizance, and counsel claimed it was really nothing but a legal cause of action in regard to which the cross-defendant was entitled to a trial by jury under the Constitution of the United States. There being room for doubt in regard to the soundness of such contention, the counsel also took an appeal to the Circuit Court of Appeals, and we think that by this action he did not waive any right of appeal which he would otherwise have had. Whichever route may be the correct one, either directly from the Circuit Court or through the Circuit Court of Appeals, it is unnecessary to decide, because the case is now properly before us either by appeal or by writ of *certiorari*, and we therefore proceed to determine it it upon the merits.

The Pullman Company, complainant in the original suit, insists that it had the right to discontinue that

suit at its own cost before any decree was obtained therein, and the refusal of the court below to grant an order of discontinuance upon its application is the first ground of objection to the decree herein.

The general proposition is true that a complainant in an equity suit may dismiss his bill at any time before the hearing, but to this general proposition there are some well recognized exceptions. Leave to dismiss a bill is not granted where, beyond the incidental annoyance of a second litigation upon the subject-matter, such action would be manifestly prejudicial to the defendant. The subject is treated of in *Detroit v. Detroit City Railroad Company*, in an opinion by the Circuit Judge, and reported in 55 Fed. Rep. 569, where many of the authorities are collected, and the rule is stated substantially as above. The rule is also referred to in *Chicago & Alton Railroad v. Union Rolling Mill Co.*, 109 U. S. 702.

From these cases we gather that there must be some plain, legal prejudice to defendant to authorize a denial of the motion to discontinue; such prejudice must be other than the mere prospect of future litigation rendered possible by the discontinuance. If the defendants have acquired some rights which might be lost or rendered less efficient by the discontinuance, then the court, in the exercise of a sound discretion, may deny the application. *Stevens v. The Railroads*, 4 Fed. Rep. 97, 105. Unless there is an obvious violation of a fundamental rule of a court of equity or an abuse of the discretion of the court, the decision of a motion for leave to discontinue will not be reviewed here.

Upon an examination of the facts relating to the motion, we think the Circuit Court was right, in the exercise of its discretion, in denying the same. The original bill was framed really on two theories: One, that by reason of an election made under the eighth clause in the lease, the Pullman Company had terminated the lease, and it was therefore bound under its provisions to return the property which it had re-

ceived from the Central Company. It stated in its bill the impossibility of returning a large portion of the property which it had received ; it announced its willingness to make substantial performance of its contract contained in the lease, and it asked the court to aid it therein by decreeing exactly what it should do for the purpose of carrying out equitably and fairly its obligations incident to its termination of the lease, under the clause above mentioned. The other theory rested upon what was a substantial allegation of the invalidity of the lease as having been made without authority of law, and therefore in violation of the corporate duties of the Central Company, and on that account not enforceable against the Pullman Company beyond the obligation of the latter company to make return of just compensation for the property demised. Upon that theory the bill asked, not that the court should set aside or cancel the lease, but that it should aid the parties by decreeing just what relief should be given by the complainant to the lessor in the execution of its duty to make some compensation for the property it received and which it stated its willingness to make, and to that end, than an accounting might be had and the amount ascertained that should be paid to the Central Company in discharge of the obligations of the complainant in that behalf. Thus the Pullman Company came into a court of equity and in substance alleged that the lease had been terminated by it under the eighth clause, and it also alleged that the lease was void as *ultra vires*, and in either event it tendered such relief as the court might think was proper and fair under the circumstances.

A large amount of proof had been taken under the issues made in this original bill and the answer thereto, and before the case was concluded the decision of this court was made in which the lease was declared to be void. The only obligation left under the original bill of complainant after the decision of this court was the obligation to return such portion of

the property received by it as the court should determine to be right, or to make some compensation to the Central Company for the same. And this obligation it had offered in the original bill to carry out.

The Pullman Company had also obtained an injunction in the original suit, restraining the Central Company from commencing further legal proceedings to recover rent under the lease, and after obtaining this injunction and taking the testimony relating to the subject-matter of the original bill, the complainant should not be permitted under these circumstances to dismiss that bill and thus withdraw the whole case from the jurisdiction of the court, and thereby blot out its tenders of relief contained in its original bill grounded, among others, upon the allegation that the lease was void, and asking the aid of the court to decree the precise terms upon which its obligations to the Central Company might be fulfilled.

The denial of the motion was made in connection with the application of the Central Company to file a cross-bill in which it would seek to avail itself of the tenders made by the Pullman Company in the original bill. Such an application for leave to file a cross-bill seeking affirmative relief while at the same time availing itself of those tenders of relief made by the original complainants, would furnish additional ground for the exercise of the discretion of the court in refusing to grant the application for leave to discontinue. We think there was no error committed by the court below in refusing the leave asked for.

The further objection is made by the counsel for the Pullman Company that it was error to allow the cross-bill to be filed in this case. Counsel for the Pullman Company assert that the cause of action for a return of the property is a purely legal one of which a court of equity has no jurisdiction, and that it can acquire none simply by the filing of a cross-bill. Whatever may be the original character of the liability of the Pullman Company to return or make compensation for the property, we are of opinion that under the facts

above set forth it cannot object to the filing of the cross-bill, or to the determination of the amount of its liability by a court of equity. It had itself voluntarily appealed to the jurisdiction of such a court for the purpose of obtaining its aid in decreeing the terms upon which its obligations to the Central Company might be fulfilled and the lease terminated, either under the eighth clause in the lease or because of its invalidity as being *ultra vires*. Having thus appealed to equity for its aid and the lease having been conclusively determined to have been void, we think it was within the fair discretion of the court to retain jurisdiction of the cause and of the original complainant, and to permit the filing of a cross-bill in which the cross-complainant might seek affirmative relief, and at the same time avail itself of the tenders made by the complainant in its original bill.

The facts which were set up in the cross-bill closely affected one of the theories upon which the original bill was filed, viz., the invalidity of the lease. They were relevant to the matters in issue in the original suit, and in seeking affirmative relief the cross-complainant is but amplifying and making clearer the foundations for the intervention of equity which had been appealed to by the Pullman Company, and the continued intervention of which would greatly speed a final termination of all matters for litigation between the parties. The court below did not err in permitting the cross-bill to be filed.

This brings us to a discussion of the principles upon which a recovery in this case should be founded. The so called lease mentioned in this case has been already pronounced illegal and void by this court. 139 U. S. 24. The contract or lease was held to be unlawful and void because it was beyond the powers conferred upon the Central Company by the legislature, and because it involved an abandonment by that company of its duty to the public. It was added that there was strong ground also for holding that the contract between the parties was void because in unreasonable

restraint of trade, and therefore contrary to public policy. In making the lease the lessor was certainly as much in fault as the lessee. It was argued on the part of the Central Company that even if the contract sued on were void, yet that having been fully performed on the part of the lessor and the benefits of it received by the lessee for the period covered by the declaration in that case, the defendant should be estopped from setting up the invalidity of the contract as a defence to the action to recover compensation for that period. But it was answered that this argument, though sustained by the decisions in some of the States, finds no support in the judgments of this court, and cases in this court were cited in which such recoveries were denied.

It is true that courts in different States have allowed a recovery in such cases, among the latest of which is the case of *Bath Gas Light Co.* v. *Claffy*, 151 N. Y. 24, where Chief Judge ANDREWS of the Court of Appeals examines the various cases, and that court concurred with him in permitting a recovery of rent upon a void lease where the lessee had enjoyed the benefits of the possession of the property of the lessor during the time for which the recovery of rent was sought.

But in the case of this lease, now before the court, a recovery of the rent due thereunder was denied the lessor, although the lessee had enjoyed the possession of the property in accordance with the terms of the lease. It was said (page 60 of the report in 139 U. S.),

"the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract nor according to its terms, but on an *implied contract* of the defendant to return, or failing to do that, to make compensation for the property or money which it had no right to retain. To maintain such an action was not to affirm, but disaffirm the unlawful contract."

And the opinion of the Court ended with the statement that

"Whether this plaintiff could maintain any action against this defendant, in the nature of a *quantum meruit*, or otherwise, independently of the contract, need not be considered, because it is not presented by this record and has not been argued. This action, according to the declaration and evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant was not liable for."

The principle is not new, but, on the contrary, it has been frequently announced, commencing in cases considerably over a hundred years old. It was said by Lord MANSFIELD, in *Holman v. Johnson*, 1 Cowper, 341, decided in 1775, that "the objection that a contract is immoral or illegal as between the plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."

The cases upholding this doctrine are numerous and emphatic. Indeed, there is really no dispute concerning it, but the matter of controversy in this case is as to the extent to which the doctrine should be applied to the facts herein. Many of the cases are referred to and commented upon in the opinion delivered in the case in 139 U. S. 24, already cited. The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it. For illustrations of the general doctrine as applied to particular facts we refer in the margin to a few of the multitude of cases upon

the subject. (*Coppell v. Hall*, 7 Wall. 542; *Spring Company v. Knowlton*, 103 U. S. 49; *Logan County Bank v. Townsend*, 139 U. S. 67; *St. Louis &c. Railroad Company v. Terre Haute &c. Railroad Company*, 145 U. S. 393, at 408, 409; *Manchester & Lawrence Railroad Company v. Concord Railroad Company*, 66 N. H. 100; *White v. Franklin Bank*, 22 Pick, 181; *Utica Insurance Company v. Cadwell*, 3 Wend. 296; *Atcheson v. Mallon*, 43 N. Y. 147; *Leonard v. Poole*, 114 N. Y. 371; *Snell v. Dwight*, 120 Mass. 9; *Davis v. Old Colony Railroad*, 131 Mass. 258; *Holt v. Green*, 73 Penn. St. 198; *Johnson v. Hulins*, 103 Penn. St. 498; *Thomson v. Thompon*, 7 Ves. 470; *Sykes v. Beadon*, L. R. 11 Ch. Div. 170; *Brooks v. Martin*, 2 Wall. 70.

They are substantially unanimous in expressing the view that in no way and through no channels, directly or indirectly will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract where, in order to maintain such recovery, it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover. But courts will not in such endeavor permit any recovery which will weaken the rule founded upon the principles of public policy already noticed.

We may now examine the record herein and learn the grounds for the recovery which has been permitted, and determine therefrom whether the judgment in favor of the Central Company should be in all things affirmed, or if not, then how far the liability of the cross-defendant extends, and, if possible, what should be the amount of the judgment against it.

In referring the case to the master for the purpose of taking the account between the parties the learned District Judge stated the principle upon which the liability of the cross-defendant rested. He said:

"The property must therefore be returned or paid for. The former is impossible. The property has substantially disappeared. It has become incorporated with the business and property of the plaintiff, and cannot be separated. Compensation must therefore be made. What, then, is the measure of compensation? Clearly, we think, the value of the property when received, together with its earnings since, less the amount paid as rent. In ascertaining the value the annual rental may be considered, but it does not afford a conclusive nor an entirely safe measure of value, because the unlawful consideration (that the Central Company would abstain from exercising its franchises) entered into it. For the same reason the earnings cannot be measured by the rent. The value of the property and earnings must be ascertained from a careful examination of the property, the business and its earnings at the time they passed into plaintiff's hands and subsequently. It is not their value to the plaintiff we want, but to the defendant; in effect, what is lost by parting with them. The value of both property and earnings may have been worth more to the plaintiff with the business united but this cannot be considered."

Acting under these directions of the court, the master in his opinion said:

"Passing to the consideration of the main question raised in the present reference, viz., what the Central Transportation Company lost by the transfer of its property to the Pullman Company, the measure of damages as determined by the court requires the master to ascertain.

"(1.) What was the value to the Central Transportation Company in 1870 of the property transferred?

"(2.) What was earned by the Pullman Company between January 1, 1870, and January 1, 1885, from the use of the property transferred?

"(3.) The difference between the amount so received by the Pullman Company and the rental paid by it to the Central Transportation Company for the above period.

"(4.) The total amount to be paid by the Pullman

Company, as of January 1, 1885, deduced as above, together with interest thereon from January 1, 1885, to date or final decree."

The master proceeded to determine the value in 1870 of the property then transferred. In ascertaining it he said:

"The value of the stock on the street is a positive indication of the estimate placed on the property by the public. That it is not entirely a satisfactory measure of value must be conceded, but in the judgment of the master, supported as it is by the best independent estimate that the evidence affords, it should be accepted as the fairest criterion of value."

He accordingly reported the value of the property when received at $58 a share, (the par value being $50 per share or a total par value of $2,200,000,) making the total market value of the shares $2,552,000, which sum he reported as the value of the property transferred.

When the report came before the court, exceptions having been taken, among other things, to the findings of the value of the property when delivered, the court said:

"It is the value of the property at the time it should have been returned that the Pullman Company should be charged with. Inasmuch as this value would be difficult of ascertainment by the transportation company except by reference to the value in 1870, it was considered proper to direct the inquiry to the latter date. Presumably the value increased; the evidence fully justifies the presumption. If it decreased, the Pullman Company could and should have shown it. The master's valuation in 1870 is therefore to be taken as the value in 1885, when the property should have been returned. The payment of this sum, with interest from January 1, 1885, seems necessary to a just settlement, treating the value of the use and the rents paid prior to that date as balancing each other. A decree may be prepared accordingly, dismissing the exceptions and confirming the report."

Judgment based upon the value of the property at $2,552,000 on the 1st of January, 1885, with interest

from that time was therefore entered and it amounted, as stated, to the sum of $4,235,044.

We are of opinion that the court erred in the manner of ascertaining the value of the property transferred by the Central Company. The market value of its stock was not a proper measure of the value of the property and such error resulted in largely increasing the supposed value of the property which the cross-defendant was under liability to account for.

The capital stock of this corporation had been increased from an original amount of $200,000 in 1862 to $2,200,000 in 1870. During this time it had been doing an increasing and a profitable business, and it was supposed that such business might increase in the future. The market price of the shares of stock in a manufacturing corporation includes more than the mere value of the property owned by it, and whatever is included in that price beyond and outside of the value of its property is a factor which in a case like this cannot be taken into consideration in determining the liability of the cross-defendant. Whatever that something may be it is not that kind of property which was delivered or that can be returned or compensation made in lieu of its return. It is not property at all within the meaning of the word as understood in such a case as this. The value of the franchise for one thing enters into the computation of market value, This was, of course, not assigned to the Pullman Company, nor were the shares of the capital stock of the Central Company, all of which remained in the hands of its original owners. The probable prospective capacity for earnings also enters largely into market value, and future possible earnings again depend to a great extent upon the skill with which the affairs of the company may be managed. These considerations, while they may enhance the value of the shares in the market, yet do not in fact increase the value of the actual property itself. They are matters of opinion upon which persons selling and buying the stock may have different views. A liability to return or make compensation for property received

cannot be properly extended so as to include other considerations than those of the actual value of that property.

In this particular case a consideration entering into the market value of the shares must have been the probability or possibility of renewals of the contracts owned by the company for the use of its cars upon the railroads of the companies with which it had such contracts and the possibility of extending its business in the future under contracts with other railroads. These considerations, while they effect more or less the value in the market of the shares of a corporation, do not constitute the value of the property which a party impliedly promises to pay for upon the agreement being determined void under which the property was received. The faith which a purchaser of stock in such a company has in the ability with which the company will be managed, and in the capacity of the company to make future earnings, may be well or ill founded. It is but matter of opinion which in itself is not property. While the value of the property is one of the material factors going to make up the market value of the stock yet it is plainly not the sole one. Mere speculation has not uncommonly been known to exercise a potent influence on the market price of stock. The capacity to make any future earnings in this case by the lessee arose out of the transfer of the property to it and grew out of the lease itself, and that capacity would therefore be partly founded upon the illegal contract and could not otherwise exist.

As the market value of the shares of this stock was made up to some extent, at least, of certain factors which the lessee cannot, under the rules of law, be held responsible for in this case, it follows that such value cannot furnish a safe guide in measuring the responsibility of the lessee in an utterly void lease. The court therefore erred in taking the market value of the shares of this stock as a proper or just measure of the value of the property transferred.

We must therefore take the property that actually was transferred and determine its value in some other way than by this resort to the market price of the stock. The property transferred consisted *(a)* of cars, bedding, etc.: *(b)* contracts which the Central Company owned with railroad companies for the use of its cars on their roads; *(c)* patents covering the construction and use of sleeping cars owned by the Central Company and by it transferred under the lease to the Pullman Company; and *(d)* $17,000 in cash. It seems to us these values must be taken separately, because, for reasons hereafter suggested, the value of the contracts and patents does not enter into the problem.

As to the value of the cars. We agree with the court below that it is now impossible to decree their return, for the reasons stated. They have substantially disappeared. The property has become incorporated with the business and property of the Pullman Company. Compensation therefore must be made. The master found that the value of the cars as vehicles, together with their equipment, at the time of the transfer, was $710,846.50. This is probably a pretty high figure judging from the whole evidence in the case upon that subject, yet still we are inclined to think that the master was justified in arriving at that sum. We take this value for the reason that the Pullman Company agreed in the lease to keep the cars in good order and repair, and renewed and reconstructed as often as might be needful during the whole term of the lease. During the fifteen years elapsing from 1870, up to January, 1885, no violation of the terms of the lease by either party is complained of, and we think the whole transaction between the parties during those fifteen years must be treated as closed, so that no examination should be made in regard to anything that happened within that time. We must assume the provisions of the lease were fully carried out by both parties, particularly as no complaints were made of non-performance. We therefore assume that the cars were kept in good order, and when necessary were reconstructed

and renewed up to January, 1885. The value of that time may be taken to be as great as the master found it to be for 1870. It is very probable the assumption is not in accordance with the fact, and that the property had greatly depreciated. But as we refuse to look into the transactions between the parties during that period, we will hold the value in 1885 to have been the same as in 1870, on the presumption that the Pullman Company fulfilled its obligations between those dates. What rule of compensation should be deduced from such finding will be alluded to hereafter.

We next come to consider the various contracts. They were entered into with different railroad companies for certain definite periods, and their time of expiration was stated in the contracts themselves. They were valuable only as they were used by the lessee, and its right to use them sprang from and was determined by the lease itself. They were assigned to the lessee for the purpose of enabling it to avail itself of the rights therein created and to use the cars with the consent of the railroads to which the contracts applied. Whether any use was made of these contracts or not they became daily less available as they daily neared their termination. The use made of them did not impair their value. The passage of time did that. The rental that was paid by the lessee included compensation for use, and to that extent the transaction was closed and the compensation paid up to the time when the contracts themselves had expired, which was prior to the time when the lease was declared void and payment of rent ceased. There is no principle with which we are familiar that will permit the value of those contracts when assigned to the Pullman Company to enter into and form a part of the value of the property for which the company is to make compensation, when from the nature of the thing itself, its value necessarily, and from the simple passage of time, decreased daily, and upon the arrival of the date named for the expiration of the contract it ceased to have any value.

We think the contracts were not extended by the legislative extension of the charter of the Central Company by the act of 1870. Some of these contracts were to last during the corporate life of the Central Company. At the time they were made the charter of the company would expire in twenty years from December 30, 1862, or on December 30, 1882. We do not think the contracts meant that they were to cover any further time to which the legislature might thereafter extend the charter of the company. Some language to that effect would have been contained in the contracts if such had been the meaning of the parties. All the contracts had therefore expired by the end of 1882.

Now upon what principle can it be urged that the lessee should compensate the lessor for the value of these contracts when delivered to it when it had paid for the use, and the property was of such a nature that it became valueless by mere limitation of time? In 1885 they had gone out of existence and, of course, had no value. The basis for a recovery of property or compensation for its value, in cases of illegal agreements, rests upon the implied contract to return it or pay for it, because there is no right in the party in possession to retain it. If at the time when otherwise it would or ought to be returned it has ceased to exist by virtue of the termination of its legal existence, how can it be returned? How can a promise to return or make compensation therefor be implied in the case of a contract having but a limited time to run and the value of which diminishes daily until the contract itself and its value are wholly extinguished by expiration of time, and where the use of this intangible right during its existence was fully paid for by the party to whom it was assigned? There is no implication of a promise to make any further compensation for such a species of property than is made by paying for its use while it remained in legal existence. When that time expired the value was gone, and while it lived it had been paid for.

We have been able to find no case where any principle was laid down which would authorize or justify a recovery of the value of property at the time of delivery, which, before its return became proper, had passed out of existence by limitation of time, and the use of which was paid for during its lifetime.

What other contracts may have been made by the Pullman Company with railroad companies would form no factor in the value of the contracts assigned. If others were obtained, they had never been the property of the Central Company, and the latter could only make a pretense of a claim in regard to them by virtue of and through the illegal contract. A resort to the illegal instrument cannot be permitted for the purpose of sustaining any recovery.

The same may be said of the patents which the Central Company also undertook to transfer, as they had all expired before January, 1885. They simply protected the use of the cars which had been constructed under them, and they diminished in value as each day brought them nearer to their expiration, and when that time arrived they were absolutely valueless. During all that time they were included in the consideration for the payment of rent made by the Pullman Company under the terms of the lease. The contracts and the patents must be eliminated from the value of the property.

Nor can we accede to the view that the Pullman Company is liable for the earnings of the property which it realized by means of putting such property to the very use which the lease provided. It had the right while both parties acquiesced to so use the property.

There is no question of trustee in the case. *Root v. Railway Company*, 105 U. S. 189, 215.

The property was placed in its hands by the lessor and in accordance with the terms of the agreement. It was not then impressed with any trust according to any definition of that

term known to us. Although the title did not pass and was not intended to pass, the lessee did nothing with the property other than was justified by the lease. His liability is based only upon an implied promise to return or make compensation therefor. This implication of a promise would not arise until one or the other party chose to terminate the lease, for the law implies such promise in order only that justice, so far as possible, may be done. So long as neither party takes any objection to the agreement, and both carry it out, there is no room for any differences, and no promise to return the property or make compensation is necessary, and none is therefore implied. The use of the property is lawful as between the parties, so long as the lease was not repudiated by either, and the rent compensates for the use. After the repudiation the promise is then implied and it is fulfilled by the payment of the value of the property at the time the promise is implied and interest thereon from that time.

As to the claim of the lessor that its business has been broken up, its contracts with railroads terminated and the corporation left in a condition of inability to again take up its former plans, and that all this should be regarded in the measure of the relief to which it should be entitled, the same considerations which we have already adverted to must be entertained. These are results of the illegality of the contract entered into between these parties, and its subsequent repudiation on that ground, and in regard to such illegality the Central Company is certainly as much in the wrong as the cross-defendant herein. The former knew the extent of its obligations under its charter as well as the latter did, and the illegal provisions of the lease were quite as much its doings as they were those of the cross-defendant. To grant relief based upon these facts would be so clearly to grant relief to one of the parties to an illegal contract, based upon the contract

itself or upon alleged damages arising out of its non-fulfillment, that nothing more need be said upon that branch of the subject. It is emphatically an application of the rule that in such a case the position of the defendant is the better.

We conclude that the cross-defendant is not liable for the contracts and patents transferred nor for the possible damage the Central Company may have sustained, as above stated. It is liable for the value of the cars, furniture, etc., transferred. It is a liberal estimate of the value of this property to say that it amounted in 1885 to as much as it did in 1870, yet we are disposed to deal in as liberal a manner with the cross-complainant as we fairly may, while not violating any settled principle of law, in order to give to it such measure of relief as the circumstances of the case seem to justify. We therefore take the value of the property in the cars, etc. in 1885 at the sum of $710,846.50 to that, we think, should be added the $17,000 cash received from the Central Company, making a total of $727,846.50 and interest from January 1, 1885, for which the cross-defendant is liable, together with costs.

Although the Central Company may have been injured by the result of this lease, yet, that is a misfortune which has overtaken it by reason of the rule of law which declares void a lease of such a nature, and while the company may not have incurred any moral guilt it has nevertheless violated the law by making an illegal contract and one which was against public policy and it must take such consequences as result therefrom.

The judgment appealed from must be

Reversed and the case remitted to the Circuit Court for the Eastern District of Pennsylvania, with directions to enter a judgment for the Central Transportation Company in accordance with this opinion.

Mr. Justice HARLAN dissented.

Mr. Justice WHITE dissented on the ground that the judgment appealed from was for the correct amount and should not be reduced.

[174 U. S. 639.]

McMullen v. Hoffman.

No. 271. Argued April 27, 28, 1899. Decided May 22, 1899.

The city of Portland, in Oregon, proposing to receive bids for the construction of what was called the Bull Run pipe line, Hoffman of Portland and McMullen of San Francisco, entered into a contract in writing as follows: "This agreement, made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth: That, whereas, said Hoffman and Bates have with the assistance of said McMullen at a recent bidding on the work of manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run water system for Portland, submitted the lowest bid for said work, and expect to enter into a contract with the water committee of the city of Portland for doing such work, the contract having been awarded to said Hoffman and Bates on said bid: It is now hereby agreed that said Hoffman and said McMullen shall and will share in said contract equally, each to furnish and pay one half of the expenses of executing the same, and each to receive one half of the profits or bear and pay one half of the losses which shall result therefrom. And it is further hereby agreed that if either of the parties hereto shall get a contract for doing or to do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses thereof shall in the same manner be shared and borne by said parties equally, share and share alike." Both put in bids for the work which forms the subject of dispute in this case. Hoffman's bid was for $465,722. McMullen's was $514,664. There were several other bids, but Hoffman's was the lowest of all. The contract was awarded to him. He did the work and received the pay. This action was brought by McMullen to recover his portion of the profit, according to the contract. *Held*, that this contract was illegal, not only as tending to lessen competition, but also because the parties had committed a fraud in combining their in-

terest and concealing the same, and in submitting the different bids as if they were *bona fide*, and that the court will not lend its assistance in any way towards carrying out the terms of an illegal contract, nor will it or any court enforce any alleged rights directly springing from such a contract.

While distinguishing *Brooks v. Martin*, 2 Wall. 70, from this case, the court holds that, taking that case into due consideration, it will not extend its authority at all beyond the facts therein stated.

This action was originally brought by the complainant McMullen against one Lee Hoffman, and he having died before the trial, the action was revived against the defendant Julia E. Hoffman, as the executrix of his will. When the defendant is hereinafter spoken of, the original defendant is intended.

The complainant filed his bill against the defendant, seeking an accounting of profits that he alleged had been made by the defendant upon a certain contract for the construction of what is termed the Bull Run pipe line, and which contract was entered into between the city of Portland, in the State of Oregon, and the defendant on or about March 10, 1893. The complainant bases his right to share in the profits of that contract by virtue of another contract in writing between himself and the defendant herein, executed March 6, 1893. * * *

An appeal from the decree of the Circuit Court was taken to the United States Circuit Court of Appeals for the Ninth Circuit, and that court held that the contract between the parties was illegal, and that no action could be maintained thereon by either, and the decree in favor of the complainant was therefore reversed. 48 U. S. App. 596. Complainant then applied to this court for a writ of *certiorari* to review the judgment of the Circuit Court of Appeals, which was granted May 9, 1898. 170 U. S. 705.

Mr. Justice PECKHAM, after stating the facts, delivered the opinion of the Court.

The foregoing statement shows that there is a difference of opinion in the courts below as to the law applicable to the case. The question is one of importance, involving as it does the principles which should control in regard to the procurement of contracts at public lettings for work to be awarded to the lowest bidder. Assuming the same facts, the courts below have come to opposite conclusions upon the character of the contract and upon the right of the complainant to obtain redress for his alleged wrongs.

It was on account of the general importance of the question and the many lettings for public works by the Government and by municipal corporations which are affected by the law relative to the bidding, that this court thought it a proper case to issue the writ of *certiorari* herein. The cases upon the subject are not entirely harmonious, and we think it well to again consider some of them and so far as possible to remove the doubts which seemingly have arisen in this branch of the law.

Looking in the record before us, we find that the pleadings and proofs taken herein show that for some time prior to the 6th of March, 1893, the city of Portland intended to add to its water supply by bringing to the city the water from a creek or river called Bull Run, some thirty miles distant, and for that purpose it had issued through its water committee proposals for bids to build the works, which proposals were divided into several different classes as already stated.

The complainant McMullen, living in San Francisco and being a large stockholder in and manager of the San Francisco Bridge Company, came to Portland for the purpose of giving his attention to the matter, and if possible to make an arrangement with the defendant by which they might together become bidders for the work. He and the defendant had many interviews before the time of delivering the bids arrived, and they finally agreed that each party should put in separate bids in his own or his firm name, or in the name of his company, for certain classes of the work, but that they

both should have a common interest in each bid if any were accepted. This community of interest was to be kept secret and concealed from all persons, including the water committee. Each was to know the amount of the other's bid, and all bids were to be put in only after mutual consultation and agreement. Bids for the various classes of work were put in as above set forth, and among them the bid for the manufacture and laying of the pipe, which was accepted by the water committee. All of them were put in pursuant to this agreement, part of them in the name of Hoffman & Bates and part in the name of the San Francisco Bridge Company. The bid in the name of the San Francisco Bridge Company for the manufacture of the pipe was nearly $50,000 higher than the amount bid in the name of Hoffman & Bates, and was put in after consultation with and approval by the defendant. This last bid was put in, as stated by Mr. McMullen in his evidence, as a matter of form only, and to keep the name of his company before the public, but it appeared on its face to be a *bona fide* bid. The water committee received the bids in ignorance of the existence of this agreement and in the supposition that all the bids which were received were made in good faith, and they all received consideration at the hands of the committee. After the computations were made by which it appeared that the bid of the defendant was the lowest for the manufacture and laying of the pipe, the contract was awarded him, and afterwards that portion of the agreement which had been made between the parties to this combination, viz., that relating to the partnership, was reduced to writing, and is set out in the foregoing statement.

Upon these facts the question arising is whether a contract between the parties themselves such as is above set forth is illegal? In order to answer the question we would first naturally ask what is its direct and necessary tendency? Most clearly that it tends to induce the belief that there is really competition between the parties making the different bids, al-

though the truth is that there is no such competition, and that they are in fact united in interest. It would also tend to the belief on the part of the committee receiving the bids that a *bona fide* bidder, seeking to obtain the contract, regarded the price he named, although much higher than the lowest bid, as a fair one for the purpose of enabling him to realize reasonable profits from its performance. A bid thus made amounts to a representation that the sum bid is not in truth an unreasonable or too great a sum for the work to be done. We do not mean it is a warranty to that effect or anything of the kind, but simply that a committee receiving such a bid and assuming it to be a *bona fide* bid would naturally regard it as a representation that the work to be done, with a fair profit would, in the opinion of the bidder, cost the amount bid. Hence it would almost certainly tend to the belief that the lower bid was not an unreasonably high one, and that it would be unnecessary and improper to reject all the bids and advertise for a new letting. The fact that there were other bids even higher than that of the San Francisco Bridge Company, for the manufacture and laying of the pipes, does not alter the tendency of the agreement when carried into effect, to create or to strengthen the belief on the part of the committee in the fact of an active competition and the *bona fide* character of that competition, and that the lowest bid would be in all probability a reasonable one. It is in truth utterly impossible to accurately or fully predict all the vicious results to be apprehended as the natural effect of this kind of an agreement. It cannot be said in all cases just what the actual effect may have been.

The natural tendency and inherent character of the agreement are also unaffected by any evidence produced on the part of the complainant, that the chairman of the water committee had, when examined nearly three years after the occurrence, no recollection as to the bid of the bridge company or that it had any particular effect upon his mind, and that he said that the contract was awarded to the lowest bidder simply

because he was the lowest bidder, and without reference to the bid of the bridge company.

The question is not whether in this particular case any member of the water committee did or did not remember the fact that the bridge company had made a bid or that such bid had no effect upon his mind. The question is not as to the effect a particular act in fact had upon a member of the water committee, but what is the tendency and character of the agreement made between the parties; and that tendency or character is not altered by proof on the part of a member of the committee, given several years afterwards, that he had no special recollection that such a bid had been made. The evidence is that all the bids that were given received the consideration of the committee, and there can be no doubt that the more bids there were, seemingly of a *bona fide* character, the more the committee would be impressed with the idea that there was active competition for the work to be done.

It might readily be surmised that if these parties had bid in competition, one or both of the bids would have been lower than their combined bid. It was not necessary, however, to prove so difficult a fact. The inference would be natural.

In *Richardson v. Crandall*, 48 N. Y. 348, 362, the court said: "In all cases where contracts are claimed to be void as against public policy, it matters not that any particular contract is free from any taint of actual fraud, oppression or corruption. The laws look to the general tendency of such contracts. The vice is in the very nature of the contract, and it is condemned as belonging to a class which the law will not tolerate," citing *Atcheson v. Mallon*, 43 N. Y. 147.

Although these remarks were made when the court was dealing with the case of a bond taken *colore officii*, yet the principle applies equally to a case like the one at bar, and indeed it is seen that such was the view of the judge delivering the opinion, since he cited *Atcheson v. Mallon*, which in its nature is a case very similar to the one now before us.

The vice is inherent in contracts of this kind, and its existence does not in the least depend upon the success which attends the execution of any particular agreement.

In *Tool Company v. Norris*, 2 Wall. 45, 56, the Court said, in speaking as to illegal agreements:

"It is sufficient to observe, generally, that all agreements for pecuniary considerations to control the business operations of the Government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution."

And in *Rex v. De Berenger*, 3 M. & S. 67, 72, cited in *Scott v. Brown*, (1892) 2 Q. B. D. 724, 730, Lord ELLENBOROUGH, C. J., said:

"A public mischief is stated as the object of this conspiracy; the conspiracy is by false rumors to raise the price of the public funds and securities; and the crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete, although it had not been pursued to its consequences, or the parties had not been able to carry it into effect. The purpose itself is mischievous; it strikes at the price of a vendible commodity in the market, and if it gives it a fictitious price by means of false rumors, it is a fraud leveled against all the public, for it is against all such as may possibly have anything to do with the funds on that particular day."

Contracts of the nature of this one are illegal in their nature and tendency, and for that reason no inquiry is necessary as to the particular effect of any one contract, because it would not alter the general nature of contracts of this description or the force of the public policy which condemns them.

In the case at bar the illegal character of the agreement is founded not alone upon the fact that it tends to lessen competition, but also upon the fact of the commission of a fraud by the parties in combining

their interests and concealing the same, and in submitting different bids as if they were *bona fide*, when they knew that one of them was so much higher than the other that it could not be honestly accepted, and when they put it in for the sake of keeping up the form and of strengthening the idea of a competition which did not in fact exist. The tendency of such agreements is bad, although in some particular case it might be difficult to show that it actually accomplished a fraud, while its intention to do so would be plain enough. Therefore, when it is urged that these parties had no intention of bidding for this work alone, and that unless they had combined their bids neither would have bid at all, and hence the agreement between them tended to strengthen instead of to suppress competition, this answer to the illegality of the transaction is insufficient. The evidence, however, does not show that if these parties had not agreed upon a combination neither would have bid alone. It shows the complainant came to Portland to see the defendant and to conclude their arrangements to go into the combination, but we are by no means of the opinion that the evidence shows that if they had not combined they would not have bid at all. Complainant's company had bid alone at a prior letting, some time before, and had then been the lowest bidder for the contract, which the city did not award because of a lack of means of payment for the work consequent upon a veto by the governor of the bill providing for the issuing of bonds to make such payment. And it seems that the defendant himself was well able to carry on the contract alone.

If it be granted that the fact was proved that neither party would have bid separately, and that by virtue of the combination a bid was made which otherwise would not have been offered, the significance of the other facts in the case is not thereby altered. Those other facts are the concealment of the interest which the parties had in each other's bids, and the

making of what were under the circumstances nothing more than fictitious bids for this and the other classes of work for which both parties put in bids, evidently for no other purpose than to endeavor thereby to deceive the committee into believing that there was real competition between them, when in fact there was none. If there had been competition, the bid of each for the contract that was obtained might very likely have been lower than the one that was accepted. It is not necessary to prove that fact in order to show the nefarious character of the agreement.

The reason given for the making of these fictitious bids by the complainant, that it was a formal matter and to keep the name of his company before the public, is entirely inadequate. The bids actually put in by them for the other classes of work had the same tendency to strengthen belief in the reality of the competition which in fact did not exist between these persons. The whole transaction was intentionally presented to the water committee in a false and deceptive light.

Upon general principles it must be apparent that biddings for contracts for public works cannot be surrounded with too many precautions for the purpose of obtaining perfectly fair and *bona fide* bids. Such precautions are absolutely necessary in order to prevent the successful perpetration of fraud in the way of combinations among those who are ostensible rivals, but who in truth are secretly banded together for the purpose of obtaining contracts from public bodies such as municipal and other corporations at a higher figure than they otherwise would. Just how the fraud is to be successfully worked out by the combination, it is not necessary to show. It is enough to see what the natural tendency is. Public policy requires that officers of such corporations, acting in the interest of others, and not using the sharp eye of a practical man engaged in the conduct of his own business, and not controlled by the powerful motive of self-interest, should, so far as possible and for the sake of the public whom they represent, be protected from the

dangers arising out of a concealed combination and from fictitious bids.

To hold contracts like the one involved in this case illegal is not to create any new rule of law for the purpose of affording the protection spoken of. It is but enforcing an old rule, and applying it to such facts as exist in this case because it naturally fits them. Its enforcement here is but to carry into effect the public policy upon which the rule itself is founded. People who have been guilty of the conduct exhibited in this record cannot be heard to say that although their arrangement was fraudulent and illegal, they would nevertheless have obtained the contract even if they had not been guilty of the fraud, because the bids show they were the lowest bidders. The bids might have been lower yet if there had been competition where there was in fact combination. The parties must accept the consequences resulting from entering into the agreement proved in this case, all of which they carried out, and included in which and as a consequence thereof was the agreement with the city and the written agreement of partnership between themselves.

In *Hyer v. Richmond Traction Company*, 168 U. S. 471, in speaking as to the character of the agreement in that case, Mr. Justice BREWER remarked that the vice of a combination "lies in the fact of secrecy, concealment and deception; the one applicant, though apparently antagonizing the other, is really supporting the latter's application, and the public authorities are misled by statements and representations coming from a supposed adverse, but in fact friendly, source."

In that case the demurrer admitted the allegation of the complaint that the combination of the two interests asking for the concession from the common council was known and announced to that body before its decision was made. The case simply shows the part which concealment takes in a combination, being in fact one of the great dangers springing therefrom.

In *Atcheson v. Mallon*, 43 N. Y. 147, 151, Judge FOLGER, in delivering the opinion of the court said:

"But a joint proposal, the result of honest cooperation, though it might prevent the rivalry of the parties, and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed, and not secret. The risk, as well as the profit, is joint, and openly assumed. The public may obtain at least the benefit of the joint responsibility, and of the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders, and weigh the merits of the bid."

We have here nothing to do with a combination of interest which is open and avowed, which appears upon the face of the bid and which is therefore known to all. Such a combination is frequently proper, if not essential, and where no concealment is practised and the fact is known, there may be no ground whatever for judging it to be in any manner improper.

But in this case there is more even than concealment. There is the active fraud in the putting in of these, in substance, fictitious bids, in their different names, but in truth forming no competitive bids, and put in for the purpose already stated. It is not too much to say that the most perfect good faith is called for on the part of bidders at these public lettings, so far as concerns their position relating to the bids put in by them or in their interests. The making of fictitious bids under the circumstances detailed herein is in its essence an illegal and most improper act; indeed, it is a plain fraud, perpetrated in the effort to obtain the desired result.

The evidence shows that this written partnership agreement was only a part of the entire agreement existing between the parties. That agreement covered and was clearly intended to cover their whole action from the time they agreed to put in their bids in a common interest up to and including the execution and performance of the contract obtained from the city. The agreement (of which that for a partnership

was but a portion) was that they should combine their interests; that they should put in bids known to each; that they should conceal the fact of their combination; that they should put in fictitious bids without expectation or purpose of having them taken; that if the contract were procured they should perform the work as partners and share expenses and divide profits. *No division of that contract into two periods, the one prior and the other subsequent to the written agreement between the parties can be made.* The complainant cannot count only upon the contract of partnership as evidenced by the writing of March, 1893. That writing evidenced only a portion of the agreement that had been made between these parties, the result being that, although their agreement was in the first instance by parol, a portion of it was subsequently reduced to writing. The whole contract is none the less one and indivisible, just as much as if it had all been put in writing. If it had been, it would scarcely be argued that complainant might maintain an action by relying on that part of it which was valid and relating to the partnership between them, and that he might discard or omit to prove that portion which was illegal. If the complainant did not, the defendant could, prove the whole contract, as well the part lying in parol as that which was reduced to writing, so that the court might, upon an inspection of the whole contract, determine therefrom its character. The unity of the contract is not severed or its meaning or effect in any degree altered by putting part of it in writing and leaving the rest in parol.

Concluding as we do that this agreement between these parties is as a whole of an illegal nature, and that the portion thereof which is reduced to writing cannot be separated from the balance of the agreement, the question then arises as to the result of such conclusion upon the parties to the agreement.

There are several old and very familiar maxims of the common law which formulate the result of that law in regard to illegal contracts. They are cited in all

law books upon the subject and are known to all of us. They mean substantially the same thing and are founded upon the same principles and reasoning. They are: *Ex dolo malo non oritur actio; Ex pacto illicito non oritur actio; Ex turpi causa non oritur actio.* About the earliest illustration of this doctrine is almost traditional in the famous case of *The Highwayman.* It is stated that Lord KENYON once said, by way of illustration, that he would not sit to take an account between two robbers on Hounslow Heath, and it was questioned whether the legend in regard to the highwayman did not arise from that saying. It seems, however, that the case was a real one. He did file a bill in equity for an accounting against his partner, although it was no sooner filed and its real nature discovered than it was dismissed with costs, and the solicitors for the plaintiff were summarily dealt with by the court as for a contempt in bringing such a case before it. (1 Lindley on Partnership, 5th ed. 94, note *n;* 9 Law Quarterly Review (London) pp. 105–197.)

The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract. In cases of this kind the maxim is *Potior est conditio defendentis.*

The following are only a few of the numerous cases upon the subject in England and in this country: *Holman v. Johnson,* (1775) 1 Cowper, 341; *Booth v. Hodgson,* (1795) 6 T. R. 405; *Thomson v. Thomson,* (1802) 7 Ves. 468; *Shiffner v. Gordon,* (1810) 12 East, 296; *Sykes v. Beadon,* (1879) L. R. 11 Ch. Div. 170; *Scott v. Brown,* (1892) 2 Q. B. D. 724; *Belding v. Pitkin,* (1804) 2 Caines, 147*a*; *Atcheson v. Mallon,* (1870) 43 N. Y. 147; *Leonard v. Poole,* (1889) 114 N. Y. 371; *Wheeler v. Russell,* (1821) 17 Mass. 258, 281; *Snell v. Dwight,* (1876) 120 Mass. 9; *Marshall v. Baltimore &*

Ohio Railroad Co., (1853) 16 How. 314, 334; *McBlair v. Gibbes*, (1854) 17 How., 232; *Coppell v. Hall*, (1868) 7 Wall. 542; *Trist v. Child*, (1874) 21 Wall. 441, 448; *Woodstock Iron Company v. Richmond & Danville Extension Co.*, (1888) 129 U. S. 643; 1 Lindley on Partnership, 5th ed. 93, note, giving the result of the American cases.

The general proposition is not disputed, but certain explanations as to its meaning and extent have been announced by the courts in cases now to be referred to, and the effort has been to show that the case before us comes under some of the exceptions to the rule, and ought not to be governed by the so-called harshness of the rule itself.

If the partnership agreement that is contained in the writing set forth is in truth but part of an entire agreement, which contains utterly illegal provisions, then this action cannot be maintained within any of the authorities.

It is only by proving the partnership agreement as an entire agreement, separate and free from the balance of the agreement between the parties, that argument can be made in favor of its validity. It has been sometimes said that where a contract, although it be illegal, has been fully executed between the parties so that nothing remains thereof for completion, if the plaintiff can recover from the defendant moneys received by him *without resorting to the contract*, the court will permit a recovery in such case. The cases cited as illustrating the excepting are, among others, *Tenant v. Elliott*, (1797) 1 Bos. & Pul. 2; *Farmer v. Russell*, (1798) 1 Bos. & Pul. 295; *Sharp v. Taylor*, (1849) 2 Phil. Ch. 801, 817; *Armstrong v. Toler*, (1826) 11 Wheat. 258, 269; *McBlair v. Gibbes*, *supra*, 17 How. 232, 235; *Brooks v. Martin*, (1863) 2 Wall. 70; *Planters' Bank v. Union Bank* (1872) 16 Wall. 483; *Armstrong v. American Exchange National Bank of Chicago*, (1889) 133 U. S. 433, 466.

Upon the point as to the ability of the

plaintiff to make out his cause of action without referring to the illegal contract, it may be stated that the plaintiff for such purpose cannot refer to one portion only of the contract upon which he proposes to found his right of action, but that the whole of the contract must come in, although the portion upon which he founds his cause of action may be legal. *Booth v. Hodgson*, 6 T. R. 405, 408; *Thomson v. Thomson*, 7 Ves. 468; *Embrey v. Jemison*, 131 U. S. 336, 348.

In the first of the above cases the plaintiff sought to maintain his action by referring to that part of the contract which was not illegal, and to ask a recovery upon that alone. Lord KENYON, Chief Justice, observed that it seemed to be admitted by counsel for plaintiff "That if the whole case were disclosed to the court there was no foundation for the demand. They say to the court, 'suffer us to garble the case, to suppress such parts of the transaction as we please, and to impose that mutilated state of it on the court as the true and genuine transaction, and then we can disclose such a case as will enable our clients to recover in a court of law.' Such is the substance of this day's argument. It is a maxim in our law that a plaintiff must show that he stands on a fair ground when he calls on a court of justice to administer relief to him."

Mr. Justice ASHURST, in the same case, said: "The plaintiffs wish us to decide this case on a partial statement of the facts, thereby admitting that if the whole case be disclosed they have no prospect of success; but we must take the whole case together, and upon that the plaintiffs cannot recover."

Mr. Justice GROSE said: "We cannot decide on a part of the case; and taking the whole together, an assumpsit cannot be raised from one part of the case when the other parts of it negative an assumpsit." The defendant therefore had judgment.

In **Thomson v. Thomson**, *supra*, the plaintiff was not permitted to recover, because he had no claim to the

money except through the medium of an illegal agreement. The Master of the Rolls (Sir WILLIAM GRANT) said: "If the case could have been brought to this, that the company had paid this into the hands of a third person for the use of the plaintiff, he might have recovered from that third person; who could not have set up this objection (the illegality of the contract) as a reason for not performing his trust. *Tenant v. Elliott* is, I think, an authority for that. *But in this instance it is paid to the party; for there can be no difference as to the payment to his agent.* Then how are you to get at it, except through this agreement. There is nothing collateral; in respect of which, the agreement being out of the question, a collateral demand arises; as in the case of stock jobbing differences. Here you cannot stir a step but through that illegal agreement; and it is impossible for the court to enforce it. I must therefore dismiss the bill."

And in **Embrey v. Jemison,** *supra*, although the action was upon four negotiable notes, the court would not permit a recovery to be had upon them, because the consideration for the notes was based upon a contract which was illegal. Mr. Justice HARLAN, in delivering the opinion of the court, said that the plaintiff could not "be permitted to withdraw attention from this feature of the transaction by the device of obtaining notes for the amount claimed under that illegal agreement; for they are not founded on any new or independent consideration, but are only written promises to pay that which the obligor had verbally agreed to pay. They do not, in any just sense, constitute a distinct or collateral contract based upon a valid consideration. Nor do they represent anything of value, in the hands of the defendant, which, in good conscience, belongs to the plaintiff or to his firm. Although the burden of proof is on the obligor to show the real consideration, the execution of the notes could not obliterate the substantive fact that they grew immediately out of, and are directly connected with, a wagering contract. They must, therefore, be regarded as

tainted with the illegality of that contract, the benefits of which the plaintiff seeks to obtain by this suit. That the defendant executed the notes with full knowledge of all the facts is of no moment. The defense he makes is not allowed for his sake, but to maintain the policy of the law," citing *Coppell v. Hall*, 7 Wall., 542, 558.

In the latter case Mr. Justice SWAYNE, delivering the opinion of the court, said:

"Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

These authorities uphold the principle that the whole case may be shown, and the plaintiff cannot prevent it by proving only so much as might sustain his cause of action, and then objecting that the defendant himself brings in the balance which it was not necessary for plaintiff to prove.

The cases above cited as illustrative of the exceptions to the general rule also show what is meant by the cause of action being founded on some new consideration, or upon a contract collateral to the original illegal one.

In **Tenant v. Elliott,** *supra*, it was held that where two persons had entered into an illegal contract in regard to insurance, and a loss having occurred, the insurer paid the money to a third person to be paid to plaintiff, the third person could not himself retain the money because it arose out of an illegal contract. EYRE, Chief Justice, asked, "Whether he who had received the money to another's use on an illegal contract, can be allowed to retain it, and that not even at the desire of those who paid it to him?"

In such case clearly the defendant had nothing whatever to do with the illegality of the original contract. He received the money to be paid to another, and when he received it for that purpose he promised, either expressly or by implication arising from the facts, that he would deliver the money to the plaintiff, and when he refused to do it the plaintiff could recover upon this express or implied contract, without resorting in any manner to the original contract between himself and another, which in its nature was illegal, but with which the defendant was in nowise concerned.

Farmer v. Russell, *supra,* is to the same effect. The defendant received the money from a third person to deliver to the plaintiff, and it was held that he was bound to pay it to the plaintiff, although the original consideration upon which the money was to be paid the plaintiff by the third person was illegal. EYRE, Chief Justice, said:

"It seems to me that the plaintiff's demand arises simply out of the circumstances of money being put into the defendant's hands to be delivered to him. This creates an *indebitatus,* from which an *assumpsit* in law arises, and on that an action on the case may be maintained. * * * The case therefore is brought to this, that the money is got into the hands of a person who was not a party to the contract, who has no pretence to retain it, and to whom the law could not give it by rescinding the contract. Though the court will not suffer a party to demand a sum of money in order to fulfil an illegal contract, yet there is no reason why the money in this case should not be recovered notwithstanding the original contract was void the difficulty with me is, that the contract with the carrier cannot be connected with the contract between the plaintiff and the man at Portsmouth, and in that view I think the verdict is not to be supported. However, I incline to a new trial on another ground. It does not clearly appear that the defendant was not himself a party to the original contract; for there was a circumstance in the report which gave much countenance to the idea that the carrier knew what he was doing, viz., that he was lending his assistance to an infamous traffic. In that case, the rule *Melior est con-*

ditio possidentis will apply; for if the contract with him be stained by anything illegal, the plaintiff shall not be heard in a Court of law."

The verdict in this case had been for the defendant. There was a question in the case whether the defendant was privy to the contract between the plaintiff and the man at Portsmouth. The goods transported were counterfeit pennies or half-pence, and *it was the opinion of Eyre, Chief Justice, that if the defendant had been privy to the original illegal agreement so that the whole thing was but one transaction, the plaintiff could not have recovered.* Mr. Justice ROOKE was of opinion that it was not important whether the defendant were privy or not; that if the contract were illegal, the plaintiff could not recover from the defendant in any event. The other two judges were of opinion that the money having been delivered to the defendant for the purpose of being paid to the plaintiff, the defendant was bound to make such payment without reference to the illegality in the original transaction.

The difference in the principle upon which a recovery was allowed in these two cases and that upon which the defence in this case is based is very clear. In the case before us the cause of action grows directly out of the illegal contract, and if the court distributes the profits it enforces the contract which is illegal. But where A claims money from B, although due upon an illegal contract, and B acknowledges the obligation and waives the defence of illegality and pays the money to a third party upon his promise to pay it to A, the third party cannot successfully defend an action brought by A to recover the money by alleging that the original contract between A and B was illegal. This is the principle decided, and we think correctly decided, in the cases cited. It was certainly no business of the third party to inquire into the reasons which impelled the person to give him the money to pay to the plaintiff. That was a matter between those parties, and if the party from whom the money was due admitted his indebtedness and chose to pay it, the defendant, who received it upon his promise

to pay the plaintiff, would have no possible defence to an action by the plaintiff to compel such payment. Such action is in no sense founded upon an illegal contract. That matter was closed when the party owing the money under it paid it to a third person to be paid to the plaintiff. The action by the plaintiff in such case is founded upon a new contract upon a totally different consideration and of a perfectly legitimate character.

The next case cited by complainant as an authority for the maintenance of this action is **Sharp v. Taylor,** *supra.* It was stated by the Chancellor in that case that where one of two partners had possessed himself of the property of the firm, he could not be allowed to retain it by merely showing that in realizing it some provision of some act of Parliament had been violated or neglected or that some provision of a foreign statute relating to the registry of vessels had not been complied with.

Lord Chancellor COTTENHAM, in the course of his opinion, said:

"The violation of law suggested was not any fraud upon the revenue, or omission to pay what might be due; but, at most, an invasion of a Parliamentary provision, supposed to be beneficial to the ship owners of this country; an evil, if any, which must remain the same, whether the freight be divided between Sharp and Taylor, according to their shares, or remain altogether in the hands of Taylor. As between these two, can this supposed evasion of the law be set up as a defense by one against the otherwise clear title of the other? In this particular suit, can the one tenant in common dispute the title common to both? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision in some act of Parliament has been violated or neglected? Can one of two partners, in any import trade, defeat the other, by showing that there was some irregularity in passing the goods through the custom house? The answer to this, as to the former case, will be, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the Court is asked to do, as between the parties. Do the authori-

ties negative this view of the case? The difference between enforcing illegal contracts and asserting title to money which has arisen from them, is distinctly taken in *Tenant v. Elliott* and *Farmer v. Russell*, and recognized and approved by Sir WILLIAM GRANT in *Thomson v. Thomson*. But the alleged illegality in this case was not in the freight being paid to English subjects claiming as owners of the ship, as in *Campbell v. Innis*. The importation of the goods in a ship American built, and not professing to have any English registry, would not be illegal, and the American owner might assign the freight to any one; assuming this to be so, I am of opinion that, under the authorities referred to, Taylor, who received the freight on account of himself and Sharp, cannot set up this defense to Sharp's claim. Upon these grounds, therefore, independently of the submission in the answer, this part of the decree is, I think, right."

These observations show that the judgment did not go upon the illegality arising from a mere violation or neglect of a provision of an act of Parliament relating to vessels, and the agreement was not classed among those contracts which are of such an illegal nature that courts refuse to enforce them. Some of the observations of the Chancellor, made by way of illustration regarding the rule itself, have been since doubted by the English courts, as in the case of *Sykes v. Beadon*, *supra*, where JESSEL, Master of the Rolls, in holding that an illegal contract could not be enforced by one party to it as against the other, directly or indirectly, said that there were several dicta of Lord COTTENHAM'S in *Sharp v. Taylor*, which he thought were not good law, and the Master of the Rolls remarked:

"It is no part of a court of justice to aid either in carrying out an illegal contract, or in dividing the proceeds arising from an illegal contract, between the parties to that illegal contract. In my opinion, no action can be maintained for the one purpose more than for the other."

Continuing, the Master of the Rolls observed:

"Then Lord COTTENHAM goes on, in *Sharp v. Taylor*, to say: 'Do the authorities negative this view of the

case? The difference between enforcing illegal contracts and asserting title to money which has arisen from them is distinctly taken in *Tenant v. Elliott* and *Farmer v. Russell*, and recognized and approved by Sir WILLIAM GRANT in *Thomson v. Thomson*.' Yes; but not in that way. I have already explained what those cases were. Those were not cases in which one of the two parties to an illegal contract sought to recover from the other a share of the proceeds of the illegal contract. Then he goes on to distinguish *Sharp v. Taylor* in a way which probably distinguishes it from cases which would be open to exception on the ground of criminality. Those are all the authorities to which I think it necessary to refer. I think the principle is clear that you cannot directly enforce an illegal contract, and you cannot ask the court to assist you in carrying it out. You cannot enforce it directly; that is, by claiming damages or compensation for the breach of it, or contribution from the persons making the profits realized from it."

Sharp v. Taylor should not be carried at all beyond the facts of the case as set out in the report.

In **McBlair v. Gibbes**, *supra*, the question was in relation to the validity of an assignment by an assignor of his interest in an illegal contract. The payment of the money arising therefrom had been, subsequent to the assignment, provided for by the party owing it, and the dispute arose between the representatives of the assignor and those of the assignee as to which were entitled to the share originally due to the assignor. It was claimed on the part of the representatives of the assignor that the original contract being illegal, the sale and assignment of an interest therein from him to the assignee was also illegal, and consequently that such interest, equitable or legal, passed to the assignor's executors. Mr. Justice NELSON, however, in delivering the opinion of the court, said:

" But this position is not maintainable. The transaction, out of which the assignment to Oliver arose, was uninfected with any illegality. The consideration paid was not only legal, but meritorious, the relinquishment of a debt due from Goodwin to him. The

assignment was subsequent, collateral to, and wholly independent of, the illegal transactions upon which the principal contract was founded. Oliver (the assignee) was not a party to these transactions, nor in any way connected with them. It may be admitted that even a subsequent collateral contract, if made in aid and in furtherance of the execution of one infected with illegality, partakes of its nature, and is equally in violation of law; but that is not this case. Oliver, by the assignment, became simply owner in the place of Goodwin, and as to any public policy or concern supposed to be involved in the making, or in the fulfillment of such contracts, it was a matter of entire indifference to which it belonged. The assignee took it, liable to any defense, legal or equitable, to which it was subject in the hands of Goodwin. In consequence of the illegality the contract was invalid, and incapable of being enforced in a court of justice. The fulfillment depended altogether upon the voluntary act of Mina, or of those representing him. No obligation existed, except what arose from a sense of honor on the part of those deriving a benefit from the transaction out of which it arose. Its value rested upon this ground, and this alone. The demand was simply a debt of honor. But if the party who might set up the illegality chooses to waive it, and pay the money, he cannot afterwards reclaim it. And, if even the money be paid to a third person for the other party, such third person cannot set up the illegality of the contract on which the payment has been made, and withhold it for himself."

What is meant by a collateral contract or a cause of action arising therefrom, which does not require reference to the principal illegal contract or transaction, is still further illustrated in **Armstrong v. Toler,** 11 Wheat. 258. In the course of his opinion Mr. Chief Justice MARSHALL assumed the facts to be that the plaintiff, during a war between this country and Great Britain, contrived a plan for importing goods on his own account from the country of the enemy, and goods were also sent to B by the same vessel. The plaintiff, at the request of B, became surety for the payment of the duties which accrued on the goods of B and was compelled to pay them, and the question was whether he could maintain an action on the promise of B to re-

turn this money, and the court held that such an action could be sustained. The court said:

"*The case does not suppose A to be concerned, or in any manner instrumental in promoting the illegal importation of B, but to have been merely engaged himself in a similar illegal transaction, and to have devised the plan for himself, which B afterwards adopted.*"

And again: "The question whether the plaintiff had any interest in the goods of the defendant, or was the contrivor of, or concerned in, a scheme to introduce them, or consented to become the consignee of the defendant's goods, with a view to their introduction, were left to the jury. The point of law decided is, that a subsequent independent contract, founded on a new consideration, is not contaminated by the illegal importation, although such illegal importation was known to Toler, when the contract was made, *provided he was not interested in the goods, and had no previous concern in their importation.*"

And at page 274: "In most of the cases cited by the counsel for the plaintiff in error, the suit has been brought by a party to the original transaction, or on a contract so connected with it as to be inseparable from it. As, where a vendor in a foreign country packs up goods for the purpose of enabling the vendee to smuggle them; or where a suit is brought on a policy of insurance on an illegal voyage, or on a contract which amounts to maintenance; or on one for the sale of a lottery ticket, where such sale is prohibited; or on a bill which is payable in notes issued contrary to law. In these, and in all similar cases, the consideration of the very contract on which the suit is brought is vicious, and the plaintiff has contributed to the illegal transaction."

The case of **Armstrong v. American Exchange Bank,** *supra,* is similar to the cases of *Tenant v. Elliott* and *Farmer v. Russell,* and was decided upon the same principle.

Counsel for the complainant also refer to a case where a plaintiff had let his horse to the defendant on Sunday, and the defendant had injured the horse by his recklessness and negligence, and recovery against him was had for the damages occasioned by such neg-

ligence, notwithstanding the illegality of the contract of hiring, because in violation of the law relating to the Sabbath day. *Hall v. Corcoran*, 107 Mass., 251.

In that case the court held the cause of action was not founded upon the contract, but the defendant was held liable by reason of his improper and neglectful conduct in regard to the horse in his possession, and which conduct was a violation of the legal duty he owed to the owner of such horse, irrespective of contract. The case was a clear instance of a proper recovery based upon collateral facts, and not founded upon any original illegal contract.

The same principle was held in *Welch v. Wesson*, 6 Gray, 505, as the damage done plaintiff by the wilful act of defendant in running into him with his sleigh had nothing to do with the race they were engaged in.

To the same effect is *Woodman v. Hubbard*, 5 Foster, (N. H.) 67. The act of damage to the horse upon which the liability rested was not connected with or part of the illegal Sunday hiring.

We think it clear that these cases cited as authority for a recovery in this case upon the ground of completion of the illegal contract or of a new contract upon a good consideration, do not touch the case before us, with the possible exception of *Sharp v. Taylor*, *supra*, and that case ought not to be extended.

In the case at bar, the action depends upon the entire contract between the parties, part of which we hold was illegal. The partnership part of the agreement cannot be separated from the rest. The complainant's claim to profits rests upon the entire contract; his right is based upon that which is illegal and utterly void, and he cannot separate his cause of action from the illegal part, and claim a recovery upon the written portion providing for and evidencing the partnership.

We come now to a consideration of the two cases upon which the counsel for the complainant sepecially rely for the maintenance of this action. They are **Brooks v. Martin,** 2 Wall. 70, and **Planters'**

Bank v. Union Bank, 16 Wall. 483. Of the two cases, *Brooks v. Martin* is the more like this one, although the cases are by no means precisely similar. The partnership in that case was stated by the court, in its opinion, to have been really engaged, probably with the full knowledge of all its members, in dealing in soldiers' claims long before any scrip or land warrants were issued by the Government and contrary to the ninth section of the act of February 11, 1847, providing for the granting of land warrants to be issued to the soldiers.

The main object of the ninth section of the act was, as the court stated, to protect the soldiers against improper contracts of the precise character of those shown in the record. It was further said that the traffic for which this partnership was formed was illegal, and that if a soldier who had sold his claim to these partners had refused to perform his contract or to do any act which was necessary to give them the full benefit of their purchase, no court would have compelled him to do it or give them any relief against it ; or if one of the partners, after the signing of the articles, had said to the other, " I refuse to proceed with this partnership because the purposes of it are illegal," the other partner would have been entirely without remedy. And if, on the other hand, one of the partners had said " I have bought one hundred soldiers' claims, for which I have agreed to pay a certain sum which I require you to advance, according to your contract." the other partner might have refused to comply with such demand, and no court would have given either of the partners any remedy for such refusal.

The court further stated that upon the facts existing, all the claims purchased by the partner having been turned into land warrants and the warrants having been sold or located, and where the purchase of the claim had been made prior to the date of the warrant, assignments having been subsequently made by the soldiers, and the portion of the lands located having

been sold partly for cash and partly on mortgage, and the assets of the partnership consisting then almost wholly of cash securities or of lands—all these facts appearing, the partner in whose possession the profits of the partnership were could be compelled to account by the other partner, and that the fact that such partner had given a release procured from him by fraud was no bar to his action for such an accounting.

The action was sustained upon the theory that the purpose of the partnership agreement had been fully closed and completed; that substantially all the profits arising therefrom had been invested in other securities or in lands; and that therefore it did not lie in the mouth of the partner who had by fraudulent means obtained possession and control of these funds to say to the other that the original contract was illegal. The wrong originally done or intended to the soldier had been wiped out by the acts of the soldier and his waiver of any claim by reason of the illegal contract. The transactions which were illegal, the court said, had become accomplished facts, and could not be affected by any action which the court might take. The cases of *Sharp. v. Taylor*, *Tenant v. Elliott*, *Farmer v. Russell*, *Thomson v. Thomson* and *McBlair v. Gibbes* were cited as authority for the proposition.

We have already adverted to each of them, and we admit it is quite difficult to see how, with the exception of *Sharp v. Taylor*, the principle upon which they were decided could be applied to the case then before the court.

There is a difference between the case before us and that of **Brooks v. Martin**, because in the latter the fact existed that the transactions, in regard to which the case of action was based, were not fraudulent, and they related in some sense to private matters, while in the case before the court the entire contract was a fraud and was illegal, and related to a public letting by a municipal corporation for work involving a large amount of money, and in which the whole municipality was vitally interested. It may be

difficult to base a distinction of principle upon these differences. We do not now decide whether they exist or not. **We simply say that taking that case into due and fair consideration, we will not extend its authority at all beyond the facts therein stated.** We think it should not control the decision of the case now before us.

In **Planters' Bank v. Union Bank,** *supra,* Confederate bonds had been sent by one party to the other for sale, and the bonds had been sold by such party as agent of the plaintiff and their price paid to such agent of the party selling, and the court held that an action would to recover the proceeds of that sale thus paid to the plaintiff's agent, although no suit could have been maintained by plaintiff against the purchaser for the purchase price of the bonds, because their sale was an illegal transaction. But when the purchase price of the bonds was paid, it certainly did not rest with the person who received the money upon an express or implied promise to pay it over to set up the illegality of the original transaction. When the bank received the funds, there was raised an implied promise to pay them to their owner, and a recovery could be sustained upon the same ground taken in *Tenant v. Elliott* and the other cases above mentioned.

It is impossible to refer to all the cases cited from the various state courts regarding this question. Some of them we should hesitate to follow. The cases we have commented upon we think give no support for the claim that the case now before us forms any exception to the rule which, as we believe, clearly embraces it. We must take the whole agreement, and remember that the action is between the original parties to it; that there is no collateral contract and no new consideration and no liability of a third party. The partnership is but a portion of the whole agreement.

We must, therefore, come back to the proposition that to permit a recovery in this case is in substance

to enforce an illegal contract, and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public consideration and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law.

Being of the opinion that the contract proved in this case was illegal in the sense that it was fraudulent, and entered into for improper purposes, the law will leave the parties as it finds them.

The judgment of the Circuit Court of Appeals was right, and must be Affirmed.

[127 Fed. Rep. 947.]

Equitable Life Assur. Soc., to Use of Reilly v. Wetherill.

(Circuit Court of Appeals, Third Circuit. February 11, 1904.)

No. 32.

1. INSURANCE—REBATES—EXECUTED ILLEGAL CONTRACT—MONEY PAID—PARTIES IN PARI DELICTO.

Where certain life insurance agents made a contract to pay the first premium on a policy for insured, in order to induce him to take the insurance, which agreement was expressly prohibited by Acts Pa. May 7, 1889, (Laws 1889, p. 116), and thereafter such agents paid the premium to the insurance company in the ordinary course of business, the contract thereby became executed, and, the parties being *in pari delicto* the Court would not aid a recovery thereof from the insured.

2. SAME—SUBROGATION.

Where certain insurance agents made and executed a contract to pay the first premium on an insurance policy issued to defendant, and the policy was thereafter issued by the insurer with an acknowledgment of payment of such premium endorsed thereon, in the absence of evidence that the agents were secondarily liable to insurer for such premium an action against insured to recover the same could not be maintained by insurer for the benefit of the agents' receiver on the ground that, as the agents had paid the debt of the insured to insurer, they were subrogated to insurer's right to recover the premium, and were entitled to sue in its name therefor.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

John Ewen, *for plaintiff in error.*

John G. Johnson, *for defendant in error.*

Before ACHESON, DALLAS and GRAY, Circuit Judges

GRAY, Circuit Judge. With this action against Richard Wetherill, another similar action was brought in

the court below against one Robert Wetherill. As the facts in each case are the same, by agreement, the two actions were tried together, and but one writ of error has been taken.

The actions were brought by one William F. Reilly, in the name of the Equitable Life Assurance Society for the use of the said Reilly, as receiver, to recover the first premium on two policies of life insurance, for $100,000 each, issued to the said defendants. The testimony adduced on the part of the plaintiff disclosed the following state of facts: The firm of Reilly & Sherman was, at the time these policies were issued, general agent for the Equitable Life Assurance Society, the firm at that time being composed of William F. Reilly, George B. Sherman and Edward A. Reilly. The firm has since gone out of business, and William F. Reilly, the equitable plaintiff, has been appointed receiver thereof and has succeeded to all its rights. In June, 1898, this defendant made application, through Reilly & Sherman, for an insurance policy of $100,000. The negotiations were conducted by Edward A. Reilly, and the policy was thereafter forwarded, through the firm of Reilly & Sherman, with a receipt for the first premium of $4,457 indorsed upon it, and was thus delivered to the defendant. This first premium was not paid by the defendant, who, having been called as a witness by the plaintiff, and after testifying to that fact, further testified that he (Reilly) agreed to pay the first year's premium, through the firm of Reilly & Sherman:

"Q. And did he tell you he had done so later? A He told me so later; yes, sir. Q. And the policy was delivered to you in the shape that it is? A. Yes. Q. You paid subsequent premiums on that policy, did you not? A. Two years, yes. Q. And later you delivered the policy to them and took up a paid-up policy in return? A. Yes. Q. Has the Equitable ever, during any of that time, claimed any of that premium from you? A. No. The receipt is on that policy. Q. Have they ever claimed it? A. No. There is evidence here that the Equitable received the payment. There is a letter here from them."

Another witness, Alfred W. Main, called by the plaintiff, testified that he was insurance and associate auditor of the Equitable Life Assurance Society, and as such, was in charge of the accounts of the agents; and that in the year 1898, between January and August, Reilly & Sherman were agents of the said society; that he had knowledge of the issuance of the policies to the Wetherills. "Q. As a matter of fact, did the firm of Reilly & Sherman ever pay the premiums on these two policies to the Equitable, in cash? A. They did." In explanation of this, the witness stated that, in rendering their monthly account, Reilly & Sherman charged themselves with this first premium, among other charges, and settled for the balance due upon that basis. This was admitted by William F. Reilly in his testimony. There is no evidence that the Equitable Life Assurance Society had knowledge of or consented to the bringing of the suit. Reilly & Sherman, in their testimony, said that they had no knowledge of the agreement testified to by Wetherill:

Upon this state of the testimony adduced by the plaintiff, the court below granted a nonsuit, saying:

"The rule in Pennsylvania undoubtedly is that when there is a suit brought by the legal plaintiff to the use of any person who is the equitable plaintiff, the equitable plaintiff must recover upon the legal title, because that is what he brings into court and is that which he represents. It is very clear to me that there is no legal claim of the Equitable Company against either of these defendants, and for that reason I will have to enter a nonsuit in each case."

The only error assigned is as to the entry of the nonsuit. The plaintiff in error's contentions are:

"(1) That the alleged agreement made with Edward A. Reilly was illegal, and not having been authorized by the members of the firm of Reilly & Sherman, was not binding upon that firm.

"(2) That the firm of Reilly & Sherman, having paid the debt of the defendant to the Equitable Life Assurance Company, became subrogated to the rights of the Equitable Life Assurance Company, both be-

cause Reilly & Sherman were also liable at the time of the payment to the Equitable Life Assurance Company, and also because the payment was made in order to protect their interest in the premium."

In support of the first contention, the first section of the act of Assembly of Pennsylvania, of May 7, 1889 (Laws 1889, p. 116), is cited. This section, after prohibiting the making of any distinction or discrimination by insurance companies in favor of individuals, as to the amount or payment of premiums or rates charged, etc., proceeds as follows:

"Nor shall any such company or agent thereof make any contract of insurance or agreement as to such contract, other than as plainly expressed in the policy issued thereon, nor shall any such company or agent pay or allow or offer to pay or allow nor shall any insurant receive directly or indirectly, as inducements to insurance, any rebate of premium payable on the policy."

The second section of the act provided that "any life insurance company, its agent or agents, or any person violating section one of this act shall be guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine," etc.

It is claimed by the plaintiff in error, that the contract testified to by Wetherill was in violation of this enactment, and therefore illegal and void.

It is sufficient answer to this point to say that the law does not help those, who have made an illegal contract, to recover back the money paid in pursuance thereof, but leaves them where it finds them. The contract was executed. Wetherill was induced to take out the policy and assume responsibility for subsequent premiums, by the undertaking of Reilly & Sherman to pay the first year's premium, which was payable in advance, as a condition precedent to the issuance of the policy. It appears by the testimony adduced by the use plaintiff, that this advance premium was paid by Reilly & Sherman to the Equitable Society, and that its policy was thereupon issued and

delivered, through Reilly & Sherman, to Wetherill. The contract, therefore, was entirely executed. The company had received the premium due to it, and had, as was testified to by plaintiff's own witnesses, no claim against Wetherill. "Where money has been paid upon an illegal contract, it is a general rule that if the contract be executed, and both parties are in *pari delicto*, neither of them can recover from the other the money so paid." *Spring Co. v. Knowlton*, 103 U. S. 49, 58, 26 L. Ed. 347; Pollock on Contracts, star p. 332; Leake on Contracts, 774.

The second contention proceeds upon the assumption that Reilly & Sherman had paid the debt of the defendant to the Equitable Life Assurance Society, and therefore became so subrogated to the rights of that society, as to enable it to prosecute in its name a suit against Wetherill, for the premium paid. The case as made by the plaintiff, however, negatives this proposition. The firm of Reilly & Sherman is not in position of one who being secondarily liable for a debt, and being obliged to pay the same, claims to have acquired, by way of subrogation, the rights of the creditor against the primary debtor. There is nothing in the case to show that Reilly & Sherman were secondarily liable to the assurance society for this premium. The premium was paid by them in the course of business, and in the ordinary settlement of their accounts with the society. The policy was issued by the society, with an acknowledgment of the first premium upon it. There never was any debt due from Wetherill to the assurance society. The payment made by Reilly & Sherman, of the first premium, while it might, perhaps, lay the ground for an *indebitatus assumpsit* in their own name against Wetherill, could not authorize the suit by the Equitable Society itself for an indebtedness that never existed.

For the reasons given, we think the nonsuit was properly granted, and the judgment below is therefore affirmed

Pollock: Principles of Contract.

[4 ed.: star pp. 253, 322–327, 329, 338.]

(A). When a transaction is forbidden, the grounds of the prohibition are immaterial. Courts of justice cannot take note of any difference between *mala prohibita* (*i. e.* things which if not forbidden by positive law would not be immoral) and *mala in se* (*i. e.* things which are so forbidden as being immoral. * * * *

4. When the immediate object or consideration of an agreement is not unlawful, but the intention of one or both parties in making it is unlawful, then—

If the unlawful intention is at the date of the agreement common to both parties, or entertained by one party to the knowledge of the other, the agreement is void.

If the unlawful intention of one party is not known to the other at the date of the agreement, there is a contract voidable at the option of the innocent party *if he discovers that intention at any time before the contract is executed.* * * *

An owner of property who has contracted to sell or let it, but finds afterwards that the other party means to use it for an unlawful purpose *is entitled (if not bound) to rescind the contract;* nor is he bound to give his reason at the time of refusing to perform it. He may justify the refusal afterwards by showing the unlawful purpose, though he originally gave no reason at all, or even a different reason.

But a completely executed transfer of property or an interest in property, though made on an unlawful consideration, or, **it is conceived, for an unlawful purpose known to both parties, is valid both at law and in equity, and cannot afterwards be set aside. And an innocent party who discovers the unlawful intention of the other after possession has been delivered under the contract is not entitled to treat the transaction as void and resume possession.** * * *

An agreement may be made void by its connection with an unlawful purpose, though subsequent to the execution of it.

To have that effect, however, the connection must be something more than a mere conjunction of circumstances into which the unlawful transaction enters, so that without it there would have been no occasion for the agreement. It must amount to a unity of design and purpose such that the agreement is really part and parcel of one entire unlawful scheme. This is well shown by some cases decided in the Supreme Court of the United States, and spreading over a considerable time. They are the more worth special notice as they are unlike anything in our own books. In *Armstrong v. Toler* (11 Wheaton, 258, 269), the point, as put by the Court in a slightly simplified form, was this : "A during a war contrives a plan for importing goods on his own account from the country of the enemy, and goods are sent to B. by the same vessel. A. at the request of B. becomes surety for the payment of the duties [in fact a commuted payment in lieu of confiscation of the goods themselves] which accrue on the goods of B., and is compelled to pay them ; can he maintain an action on the promise of B. to return this money?" The answer is that he can, for the "contract made with the government for the payment of duties is a substantive independent contract entirely distinct from the unlawful importation." *But it would be otherwise if the goods had been imported on a joint adventure by A. and B.* In *Blair v. Gibbes* (17 How. 232) an assignment of shares in a company was held good as between the parties though the company had been originally formed for the unlawful purpose of supporting the Mexicans against the Spanish Government before the independence of Mexico was recognized by the United States. In *Miltenberger vs. Cooke* (18 Wall. 421) the facts were these. In 1866 a collector of United States revenue in Mississippi took bills in payment when he ought to have taken coin, his reason being that the state of the country made it still unsafe to have much coin on hand. In account with the government he charged himself and was charged with the amount as if paid in coin. Then he sued the acceptors

on the bills, and it was held there was no such illegality as to prevent him from recovering. If the mode of payment was a breach of duty as against the Federal government, it was open to the government alone to take any objection to it. * * *

6. *a.* "When it is sought to avoid an agreement not being in itself unlawful on the ground of its being meant as part of an unlawful scheme or to carry out an unlawful object, it must be shown that such was the intention of the parties at the time of making the agreement."

The fact that unlawful means are used in performing an agreement which is *prima facie* lawful and capable of being lawfully performed does not of itself make the agreement unlawful. This or other subsequent conduct of the parties in the matter of the agreement may be evidence, but evidence only, that a violation of the laws was part of their original intention, and whether it was so is a pure question of fact. The omission of statutory requisites in carrying on a partnership business is consistent with the contract of partnership itself being lawful; but if it is shown as a fact that there was from the first a secret agreement to carry on the business in an illegal manner, the whole must be taken as one illegal transaction. * * *

7. Money paid or property delivered under an unlawful agreement cannot be recovered back, nor the agreement set aside at the suit of either party—

unless nothing has been done in the execution of the unlawful purpose beyond the payment or delivery itself (and the agreement is not positively criminal or immoral?);

or unless the agreement was made under such circumstances as between the parties that if otherwise lawful it would be voidable at the option of the party seeking relief;

or, in the case of an action to set aside the agreement, unless in the judgment of the Court the interests of third persons require that it should be set aside.

Pomeroy: Equity Jurisprudence.

[2 Ed.: Vol. 2, pp. 1349-1359.]

SEC. 939. *Other Illegal Contracts.*—I have already, in the former volume, stated and illustrated the general rules which determine when relief will or will not be given in cases of ordinary illegal contracts. Without repeating what was there said, I purpose to explain the meaning and effect of the three maxims which limit the exercise of the equitable jurisdiction, and to ascertain and formulate, if possible, such conclusions as shall be sustained both by principle and by authority. These maxims are, *Ex turpi causa non oritur actio; In pari delicto melior est conditio possidentis;* or *In pari delicto melior est conditio defendentis.* What is meant by the "condition" of the possessor, or the defendant, which is so much "better"—or, as the maxim sometimes reads, "stronger" *(potior)*—that it will not be disturbed? Plainly, it is not the condition merely of an executory contract having been made and subsisting between the parties; the maxim does not refer to the condition of the executory contract which has been entered into remaining unaltered and unmolested; otherwise the setting up the illegality as a defense would be prohibited, for it would directly violate the maxim. The defense is always allowed, and this necessarily disturbs the condition of the contract. The "condition" referred to in the maxim is clearly the condition of the parties with respect to their property rights created by or resulting from the contract. If the contract is still executory, the promisor is left undisturbed in the possession of the money or other property which he agreed to pay or transfer; if the contract has been executed, the promisee is left undisturbed in the possession of the money or other property which has been paid or conveyed to him. This is the true meaning of the maxim, and it involves no requirement that the contract, as a mere *executory instrument*, should remain unmolested; it deals solely with the rights flowing, or which would flow, from the

agreement. The form, therefore, which correctly expresses the thought is *Melior est conditio possidentis;* "*defendentis*" is appropriate only when regarded as equivalent to *possidentis.* The foregoing analysis is not a mere verbal discussion. Upon the true signification given to "condition," in the maxim, depends to a great extent the doctrine concerning affirmative equitable relief against illegal contracts.

SEC. 940. *In Pari Delictio—General Rules.* The proposition is universal that no action arises, in equity or at law, from an illegal contract; no suit can be maintained for its specific performance, or to recover the property agreed to be sold or delivered, or the money agreed to be paid, or damages for its violation. The rule has sometimes been laid down as though it were equally universal, that where the parties are *in pari delicto,* no affirmative relief of any kind will be given to one against the other. This doctrine, though true in the main, is subject to limitations and exceptions which it is the special object of the present inquiry to determine. As applications of this principle, the following rules may be regarded as settled, where the parties are *in pari delicto:* If the contract has been voluntarily executed and performed, a court of equity will not, in the absence of controlling motives of public policy to the contrary, grant its aid by decreeing a recovery back of the money paid or property delivered, or a cancellation of the conveyance or transfer. As long as the contract is executory, it cannot be enforced in any kind of action brought directly upon it; the illegality constitutes an absolute defense. As an application of the same doctrine merely in a different form, while the agreement is executory, courts of equity may relieve the debtor or promising party by ordering the written instrument and other securities to be surrendered and canceled, and by granting the ancillary remedies of injunction, discovery and the like. Whenever the circumstances are such that the defensive remedy at law would not be equally certain, perfect, and adequate, this jurisdiction

will be exercised. The equitable relief so conferred does not violate the general maxim concerning parties *in pari delicto*; on the contrary, it carries that maxim into effect. It has already been shown that the maxim, rightly interpreted, does not require the condition of the parties, *with respect to the subsisting executory contract*, to remain unchanged and undisturbed. The remedy of cancellation or injunction, under the circumstances, is simply the equitable proceeding identical with the setting up the illegality as a defense to defeat a recovery at law, and thus to get rid of the contract as a binding executory obligation. The parties are left undisturbed as to their property rights.

SEC. 941. *In Pari Delicto—Limitation on the General Rules.* To the foregoing rules there is an important limitation. Even where the contracting parties are *in pari delicto*, the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him. In pursuance of this principle, and in compliance with the demands of a high public policy, equity *may* aid a party equally guilty with his opponent, not only by canceling and ordering the surrender of an executory agreement, but even by setting aside an executed contract, conveyance, or transfer, and decreeing the recovery back of money paid or property delivered in performance of the agreement. The cases in which this limitation may apply and the affirmative relief may thus be granted include the class of contracts which are intrinsically contrary to public policy,—contracts in which the illegality itself consists in their opposition to public policy, and any other species of illegal contracts in which, from their particular circumstances, incidental and collateral motives of public policy require relief.

SEC. 942. *Not in Pari Delicto.*—Lastly, when the contract is illegal, so that both parties are to some extent involved in the illegality,—in some degree affected with the unlawful taint,—but are not *in pari delicto*,—

that is, both have not, with the same knowledge, willingness and wrongful intent, engaged in the transaction, or the undertakings of each are not equally blameworthy,—a court of equity may, in furtherance of justice and of a sound public policy, aid the one who is comparatively the more innocent, and may grant him full affirmative relief, by canceling an executory contract, by setting aside an executed contract, conveyance, or transfer, by recovering back money paid or property delivered, as the circumstances of the case shall require, and sometimes even by sustaining a suit brought to enforce the contract itself, or if this be impossible, by permitting him to recover the amount justly due, by means of an appropriate action not directly based upon the contract. Such an inequality of condition exists so that relief may be given to the more innocent party, in two distinct classes of cases: 1. It exists where the contract is intrinsically illegal, and is of such a nature that the undertakings or stipulations of each, *if considered by themselves alone*, would show the parties equally in fault, but there are collateral and incidental circumstances attending the transaction, and affecting the relations of the two parties, which render one of them comparatively free from fault. Such circumstances are imposition, oppression, duress, threats, undue influence, taking advantage of necessities or of weakness, and the like, as a means of inducing the party to enter into the agreement, or of procuring him to execute and perform it after it has been voluntarily entered into. 2. The condition also exists where, in the absence of any incidental and collateral circumstances, the contract is illegal, but is *intrinsically* unequal; is of such a nature that one party is necessarily innocent as compared with the other; the stipulations, undertakings, and position of one are essentially less illegal and blameworthy than those of the others.

Story : Equity Jurisprudence.

[13 ed. : vol. 1, pp. 300-303.]

296*a*. But where a party to an illegal or immoral contract comes himself to be relieved from that contract or its obligations, he must distinctly and exclusively state such grounds of relief as the court can legally attend to ; and he must not accompany his claim to relief, which may be legitimate, with other claims and complaints which are contaminated with the original immoral purpose ; for if he sets up as a ground of relief the non-fulfillment of the illegal contract on the other side, and thereby that he is released from his obligation to perform it, that shows that he still relies upon the immoral contract and its terms for relief, and therefore the Court will refuse it. * * *

298. And here it may be well to take notice of a distinction, often but not universally acted on in courts of equity, as to the nature and extent of the relief which will be granted to **persons who are parties to agreements or other transactions against public policy, and therefore are to be deemed participes criminis.** In general (for it is not universally true), where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita or mala in se*, courts of equity, following the rule of law as to participators in a common crime, will not at present interpose to grant any relief ; acting upon the known maxim, " *In pari delicto potior est conditio defendentis, et possidentis.*" But in cases where the agreements or other transactions are repudiated on account of their being against public policy, the circumstance that the relief is asked by a party who is *particeps criminis* is not in equity material. The reason is that the public interest requires that relief should be given, and it is given to the public through the party. And in these cases relief will be granted, not only by setting aside the agreement or other transaction, but also in

many cases by ordering a repayment of any money paid under it. Lord THURLOW indeed seems to have thought that in all cases where money had been paid for an illegal purpose it might be recovered back, observing that if courts of justice mean to prevent the perpetration of crimes, it must be not by allowing a man who has got possession to remain in possession, but by putting the parties back to the state in which they were before. But this is pushing the doctrine to an extravagant extent, and effectually subverting the maxim, '*In pari delicto potior est conditio defendentis.*' The ground of reasoning upon which his Lordship proceeded is exceedingly questionable in itself; and the suppression of illegal contracts is far more likely in general to be accomplished, by leaving the parties without remedy against each other, and by thus introducing a preventive check naturally connected with a want of confidence, and a sole reliance upon personal honor. And so accordingly the modern doctrine is established. **Relief is not granted where both parties are truly** *in pari delicto* **unless in cases where public policy would thereby be promoted.**

Story: Sales of Personal Property.

[4th ed.: p. 607.]

The vendee having obtained possession of property sold under a contract void because made on Sunday, as of his own property, by the assent of the vendor, the title passes to him and he has a right to maintain that possession against both the vendor and his creditors. [Citing *Smith v. Bean*, 15 N. H. 577; *Simpson v. Nicholls*, 3 Mees & W. 240, 241; *Green v. Godfrey*, 44 Maine, 25.]

Addison : Contracts.

[1883 ; 8th ed. : vol. 2, pp. *1171–*1172.]

If indentures of apprenticeship are void by reason of the amount of the premium paid with the apprentice not being truly or correctly stated pursuant to the requirements of the Stamp Acts, the money actually given with the apprentice cannot be recovered back on the ground of a failure of consideration, as both parties are *in pari delicto.*

When, however, the parties are not *in pari delicto*, the more innocent of the two may obtain the assistance of the law for the recovery of money paid by him to the other under the illegal contract, although the unlawful act may have been fully accomplished. And it has been held that a debtor paying money to one creditor as the price of procuring a fraud on his other creditors before the creditors enter into a composition, can recover back the money, the parties not being *in pari delicto. (Atkinson v. Denby*, 30 L. J. Ex. 361 ; 31 *ib.* 362 ; 7 H. & N. 934 ; *In re Lenzberg's Policy*, 7 Ch. D. 650.)

"If the contract," observes Domat, "is unlawful only on the part of him who receives, and not on the part of him who gives, he who has given money under the contract may recover it back, although the contract has been fulfilled by the receiver of such money. But if the contract is unlawful both on the one side and on the other, as if one party gives money to a judge to gain his cause, or one person gives money to another to induce him to commit a crime, he who has thus given his money is justly deprived of what he has expended, and cannot recover it back." (Les Lois Civ. liv. 1, tit. 18, sect. 14, 5.)

§ 169. *Sale—Possession—Rights—Creditors.*—Where the possession of property is acquired or obtained by contract of sale on Sunday, though the contract be illegal, the possession is by permission and he may retain it as against his vendor or anyone claiming under him, and against the creditors of his vendor, not that he has any legal title which the law will protect, but because his vendor cannot be heard to set up a claim to it, and it is the inability of the vendor which protects the possession of the vendee, and is, to him, in effect, the same as a sufficient title. Then, if he cannot recover it, his creditors cannot subject it to the payment of his debts, and it is not subject, in the hands of the vendee, to attachment or execution against the vendor.

[36 Misc. (N. Y.) 583.]

1901.

Hackett v. Northern Pacific Ry. Co.

(Supreme Court, New York Special Term, December, 1901.)

Corporation—Issue of preferred stock—Option for its retirement at par—Rights of a holder—Exercise of the option—Not an organic change—Injunction refused where there is a remedy in damages.

Where a foreign railway corporation is authorized by law to issue, upon a vote of a majority of its stockholders, preferred stock, without any conditions or restrictions, the corporation may upon due issue thereof for value attach thereto such conditions as it chooses, these conditions when assented to by holders become the contract between it and them and their acquiescence follows their acquisition of the stock.

A condition of the issue, that the corporation may, on any 1st day of January prior to 1917, retire the whole or any part of the preferred stock at par, is valid; and where the act of incorporation also provides that the preferred may be made convertible into common stock at the option of the corporation, it may lawfully carry out a plan to retire the preferred stock at par, issue common stock instead, and give present holders of the common stock the privilege of acquiring all the additional common stock.

Holders of the preferred have no other rights than to have the option exercised legally and receive par for their stock and, therefore, will not be permitted to enjoin such a plan upon the ground that it will reduce the capital of the corporation, for, assuming the contention to be true, the reduction will come after they have ceased to have any interest in the corporation.

Where its charter provides that all its affairs shall be managed by a board of directors and they are invested with all the powers of the corporation "except as hereinafter provided", a resolution of the board, re-

tiring all the preferred stock at par on Jan. 1, 1902, is a valid exercise by the corporation of the option.

The exercise of such an option does not effect an organic change in the composition or business of the corporation.

Assuming that the holders of the preferred have a right to exchange it for the new common stock and that the right has been wrongfully denied them, their remedy is in damages, the corporation being solvent, and they are not entitled to an injunction.

Motion for injunction *pendente lite*.

SCOTT, J.:—This is an application by holders of preferred stock of the defendant corporation, for an injunction *pendente lite* restraining the consummation of a plan whereby it is proposed to retire the preferred stock of the company at par, and to issue in place thereof common stock to an equal amount, giving to the present holders of the common stock the privilege of acquiring the additional common stock to be issued in substitution for the preferred stock.

The defendant corporation, as at present known and constituted came into being in 1896, as the result of the reorganization of another corporation known as the Northern Pacific Railroad Company. This defendant was incorporated by the legislature of Wisconsin in the year 1870 under the name of the Superior and St. Croix Railroad Company with an authorized capital stock of five million dollars, which might be increased to ten million dollars. This Act was amended from time to time until finally in 1895, by chapter 244 of the laws of that year, very radical amendments were made, which permitted and doubtless were intended to permit the acquisition of the property and franchises belonging to the Northern Pacific Railroad Company then about to be reorganized.

The powers of the corporation were largely increased. With reference to the capital stock it was provided that it might be increased from time to time, by a vote

of a majority of the stockholders, to such an amount as might by them be deemed necessary. It was further provided that the company might, by a like vote of its stockholders classify its stock into common and preferred, and divide its preferred stock into different classes and make any or all of its preferred stock cumulative or non-cumulative as to dividends. It was further provided that said company might "make such "preferred stock convertible into common stock, upon "such terms and conditions as may be fixed by the "board of directors."

On July 1st, 1896, the name of the corporation was changed to that now borne by it, and on the same day certain resolutions were adopted by the unanimous vote of its then stockholders. One of these resolutions provided for an increase of the capital stock to one hundred and fifty five million dollars, to be divided into eighty millions of common stock, and seventy five millions of preferred stock. Among the provisions inserted in this resolution was the following:

"Resolved that such preferred stock shall be issued "upon the condition that at its option the company "may retire the same in whole or in part, at par, "from time to time, on any first day of January prior "to 1917."

The second resolution, adopted on the same day recited that the property and franchises of the Northern Pacific Railroad Company were about to be sold under foreclosure; that the firm of J. P. Morgan & Co. as reorganization managers of said company, under a certain plan and agreement for reorganization, had acquired large proportionate parts of the several issues of the securities of said company which they proposed either to use themselves in the purchase of the property and assets of said company, or to turn over to the Northern Pacific Railway Company, in exchange for its capital stock and bonds, so that said last named company might purchase said property and franchises. The Directors of this defendant were therefore author-

ized to enter into an agreement with the reorganization managers for the acquisition of securities of the Northern Pacific Railroad Company to be used in the purchase of its properties and franchises, issuing in return to said reorganization managers securities, in stock and bonds of this defendant.

The directors of the defendant on July 13th 1896 made such an agreement as had been then authorized with the reorganization managers, whereby the defendant corporation agreed to issue and deliver to said managers, in exchange for securities of the Northern Pacific Railroad Company, bonds of the defendant, and certificates for seventy five million dollars of preferred stock and eighty million dollars of common stock. This agreement referred to, and by reference incorporated into itself the plan or agreement for the reorganization of the Northern Pacific Railroad Company, under and upon the faith of which the holders of the securities of the said company had deposited those securities with the reorganization managers.

In this plan or agreement, it was expressly stated, referring to whatever company might acquire the properties and franchises of the said Northern Pacific Railroad Company, and speaking of the preferred stock to be issued by said purchaser company.

> " the right will be reserved by the new company
> " to retire this stock in whole or in part, at par,
> " from time to time, upon any first day of Janu-
> " ary during the next twenty years."

The certificates of stock which were issued under the foregoing resolutions and agreement, both for the common and preferred stock, as well as every certificate of stock of either class which has been issued since have contained the following clause:

> " The company shall have the right at its
> " option, and in such manner as it shall deter-
> " mine, to retire the preferred stock in whole or

" in part, at par, from time to time upon any first " day of January prior to 1917."

The defendant corporation was expressly authorized by its charter to issue preferred stock, and no restriction, or limitation was put upon it, as to the terms and conditions upon which such stock was to be issued, except that the company might at its option make it convertible into common stock. The company was therefore left free to attach such conditions and restrictions upon the issue of such stock as it saw fit, and the conditions and restrictions thus attached, when agreed to by the holders of such stock, became a valid and enforceable contract between the company and such holders, whose acquiescence followed upon their acquisition of the stock (*Scott* vs. *B. & O. R. Co.* 49 Atl. Rep. 327).

The contract between this defendant and its preferred stockholders is definite and precise. It had its birth at the very moment that the issue of preferred stock was authorized by a vote of the stockholders, and from that moment became a part of every share of preferred stock issued, as a vital condition of its issuance; its terms have been incorporated into every certificate of stock issued by the company, including those held by the plaintiffs, who thus acquired their stock with full knowledge and notice of the basic condition upon which the stock had been authorized; it was founded upon the equitable consideration that the holders of securities of the predecessor company had surrendered their securities to their agents, the reorganization managers upon the faith of the statement in the plan or agreement of reorganization, that the new company would attach such a condition to the preferred stock which they issued to the reorganization managers in exchange for such securities of the predecessor company.

I see no reason to doubt that the condition then attached to the preferred stock was one which the company had the right to attach. Preferred

stock, in its very nature, is stock which is held under a different contract and subject to different conditions, from those under which common stock is held. It is of course competent for the Legislature to prescribe what these conditions shall be and to forbid all others. It may however leave the determination of that question to the company itself, and it does so leave it when it fails to specify and limit the conditions. The Legislature of Wisconsin placed no limitation upon the terms which this company might attach to its issue of preferred stock, and therefore left it to determine those terms for itself.

It is claimed however that although it was lawful for the company and the preferred stockholders to agree that the stock might be retired at par, still that the company cannot enforce that contract, and retire the stock because to do so would involve a reduction of the capital, by an amount equal to the outstanding preferred stock. This contention is founded upon a nice distinction between the meaning of the word "retire" and that of the word "acquire." If the condition upon which the preferred stock was issued had been that the company might at its option "acquire" the preferred stock, this particular objection to the proposed action of the defendant would clearly be without any foundation, for it cannot be doubted the company has the legal right to purchase its own stock. It is argued however that to "retire" stock, necessarily means that it is to be extinguished, and that if seventy five millions of preferred stock should be extinguished the capital of the company would be, to that extent, reduced. It is not apparent how the plaintiffs are interested in the question whether or not the capital stock of the company is reduced, or if reduced whether or not such reduction is lawful. Such reduction if it takes place at all, will take place after their interest in the company has come to an end by the retirement of their stock.

An examination of the resolution adopted by the defendant's directors will show that the capital stock of the company will not in fact be reduced or increased. It will still remain, as originally fixed at one hundred and fifty five millions, the sole difference being that all of the capital stock will be common stock.

The burden of the plaintiffs' complaint is that they will not be permitted to exchange their preferred stock for common. They do not point out why they are entitled to such an exchange. Certainly no contract to that end was ever made with them. Their agreement was that their stock might, at the company's option, be retired at par. This condition which now appears to be a burdensome one, was doubtless inserted as an offset to their preferential right to receive dividends if the net earnings of the company should not provide dividends for both classes of stock. Having assented to this condition, they cannot avoid its enforcement merely because they apprehend that as a result of such enforcement the company may do some unauthorized act, unless they can also show that such unauthorized act will injure them in some way other than by retiring their stock. The company has the right to retire the stock at its option. All that the plaintiffs are entitled to insist upon is first; that the option shall be exercised in a legal way, and secondly; that they shall receive par for their stock. With what happens afterward they have no concern.

It is a mistaken view to take of the functions of a Court of equity that it will interfere by a writ of injunction to prevent an abstract wrong, or one not affecting any person who invokes its aid. Even if it appeared, which I do not intend to be understood as intimating, that the directors of this defendant contemplated doing something after the plaintiffs' stock had been retired which would be unauthorized by law or beyond the powers of the corporation, still the Court would not be called upon to act by way of injunction, unless appealed to by some person who would suffer

loss or injury from the threatened act, or, in some cases, by the State. It does not appear that these plaintiffs will, or can so suffer, for when such unauthorized acts, if they be such, are performed the plaintiffs' interest in the corporation will have come to an end by the retirement of their stock.

It remains to consider whether the company has lawfully exercised the option to retire the stock. The attempt to do so was by a resolution of the Board of Directors, whereby it was resolved that the defendant corporation

" has determined and hereby does determine to re-
" tire the preferred stock of the Northern Pacific Rail-
" way Company, in whole, at par, upon the first day of
" January, 1902."

The charter (Sec. 8, Chap. 244 Laws of Wisconsin, 1895) provides that " all of the affairs of said com-
" pany shall be managed by a board of directors, who
" shall be stockholders, and who are hereby invested
" with all the powers of the corporation except as
" hereinafter provided." It is of course true that this authority does not empower the directors to make organic or fundamental changes in the composition or business of the corporation. (*Railway Company* vs. *Allerton*, 18 Wall. 223). The exercise of the option to retire the preferred shares cannot in any proper sense be considered as affecting such a fundamental change. The retirement of the preferred stock at some time was contemplated by the stockholders, and was provided for when the issue of the stock was authorized. All that was left was the determination as to when the option should be exercised and the retirement take place. This was a matter peculiarly within the scope of the Directors powers, and even if the assent of the stockholders were necessary that assent might be given at any time and in any manner which would serve to show that they approved of the exercise of the option (*Payson* vs. *Stover*, 19 Fed. Cas. 27). It is asserted by

the answer that more than a majority of the stockholders of both classes have signified their acquiescence.

Many other questions have been raised and ably argued in the briefs of counsel. That they are not discussed at length in this opinion is not to be taken as an indication that they have not been examined and considered; but only that their discussion at length does not appear to be necessary.

I am satisfied that the plaintiffs as holders of preferred stock have not and never have had the right to insist that their stock should be transformed into common stock, or that they should be permitted to subscribe for the common stock proposed to be issued in place of the present preferred stock. That on the other hand the company has the positive right at its option to retire the preferred stock at par, and that the directors of the company are authorized to exercise that option in behalf of the company. That the plaintiffs have no concern with what may be done with the stock of the company after their preferred shares have been retired, or in consequence of such retirement, nor are they in a position to question the manner in which the company proposes to raise the money to retire their shares, so long as they are assured of the par value thereof.

Even if the defendant's right to retire the plaintiffs' stock was less clear than I deem it to be I should still hesitate to permit the temporary injunction to stand. The plaintiffs though holding preferred stock to a considerable amount, really hold but a small percentage of this class of stock and of course a much smaller percentage of the total capital stock of the company. Their claim is, that they are entitled to an opportunity to subscribe for the convertible certificates representing common stock to be issued in place of the preferred stock. Upon what that claim is based is not made very apparent, but assuming that it is well founded, no reason is suggested why they cannot be fully

and amply compensated in an action for damages for the denial of their assumed right. The amount of common stock to which they would be entitled, and its value would be readily ascertainable, and no suggestion is made that the defendant is not solvent and well able to respond in damages. I see nothing in the case to warrant a departure from the rule that an injunction will not issue to prevent a threatened invasion of a plaintiff's rights where his remedy by an action for damages is available and adequate, and the damages, if any, are easily ascertainable.

It follows that the motion to continue the temporary injunction must be denied, and the said temporary injunction vacated with $10 costs.

No. 512.

THE UNITED STATES

vs.

NORTHERN SECURITIES CO. AND OTHERS.

OPINIONS AND DECREE.

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Supreme Court of the United States.

NO. 277.—OCTOBER TERM, 1903.

NORTHERN SECURITIES COMPANY ET AL., Appellants, vs. THE UNITED STATES.	Appeal from the Circuit Court of the United States for the District of Minnesota.

[March 14th, 1904.]

Mr. Justice HARLAN announced the affirmance of the decree of the Circuit Court, and delivered the following opinion:

This suit was brought by the United States against the Northern Securities Company, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; the Northern Pacific Railway Company, a corporation of Wisconsin; James J. Hill, a citizen of Minnesota; and William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont, citizens of New York.

Its general object was to enforce, as against the defendants, the provisions of the Statute of July 2d 1890, commonly known as the Anti-Trust Act, and entitled "An act to protect trade and commerce against unlawful restraint and monopolies." 26 *Stat.* 209. By the decree below the United States was given substantially the relief asked by it in the bill.

As the act is not very long, and as the determination of the particular questions arising in this case may require a con-

sideration of the scope and meaning of most of its provisions, the act is here given in full:

"§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"§ 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with any foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"§ 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying

that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and, pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

"§ 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

"§ 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

"§ 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

"§ 8. That the word 'person,' or 'persons,' wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Is the case as presented by the pleadings and the evidence one of a combination or a conspiracy in restraint of trade or commerce among the States, or with foreign states? Is it one in which the defendants are properly chargeable with monopoliz-

ing or attempting to monopolize any part of such trade or commerce? Let us see what are the facts disclosed by the record.

The Great Northern Railway Company and the Northern Pacific Railway Company owned, controlled and operated separate lines of railway—the former road extending from Superior, and from Duluth and St. Paul, to Everett, Seattle, and Portland, with a branch line to Helena; the latter, extending from Ashland, and from Duluth and St. Paul, to Helena, Spokane, Seattle, Tacoma and Portland. The two lines, main and branches, about 9,000 miles in length, were and are parallel and competing lines across the continent, through the northern tier of States between the Great Lakes and the Pacific, and the two companies were engaged in active competition for freight and passenger traffic, each road connecting at its respective terminals with lines of railway, or with lake and river steamers, or with seagoing vessels.

Prior to 1893 the Northern Pacific system was owned or controlled and operated by the Northern Pacific Railroad Company, a corporation organized under certain acts and resolutions of Congress. That company becoming insolvent, its road and property passed into the hands of receivers appointed by courts of the United States. In advance of foreclosure and sale a majority of its bondholders made an arrangement with the Great Northern Railway Company for a virtual consolidation of the two systems, and for giving the practical control of the Northern Pacific to the Great Northern. That was the arrangement declared in *Pearsall* v. *The Great Northern Railway Company*, 161 *U. S.* 646, to be illegal under the statutes of Minnesota which forbade any railroad corporation or the purchasers or managers of any corporation, to consolidate the stock, property or franchises of such corporation, or to lease or purchase the works or franchises of, or in any way control, other railroad corporations owning or having under their control parallel or competing lines. *Gen. Laws, Minn.*, 1874, *c.* 29; *ch.* 1881.

Early in 1901 the Great Northern and Northern Pacific Railway Companies, having in view the ultimate placing of their two systems under a common control, united in the purchase of the capital

stock of the Chicago, Burlington and Quincy Railway Company, giving in payment, upon an agreed basis of exchange, the joint bonds of the Great Northern and Northern Pacific Railway Companies, payable in twenty years from date, with interest at 4 per cent. per annum. In this manner the two purchasing companies became the owners of $107,000,000 of the $112,000,000 total capital stock of the Chicago, Burlington and Quincy Railway Company, whose lines aggregated about 8,000 miles, and extended from St. Paul to Chicago, and from St. Paul and Chicago to Quincy, Burlington, Des Moines, St. Louis, Kansas City, St. Joseph, Omaha, Lincoln, Denver, Cheyenne and Billings, where it connected with the Northern Pacific railroad. By this purchase of stock the Great Northern and Northern Pacific acquired full control of the Chicago, Burlington and Quincy main line and branches.

Prior to November 13th 1901 defendant Hill and associate stockholders of the Great Northern Railway Company, and defendant Morgan and associate stockholders of the Northern Pacific Railway Company, entered into a combination to form, under the laws of New Jersey, a *holding* corporation, to be called the Northern Securities Company with a capital stock of $400,000,000, and to which company, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be turned over the capital stock, or a controlling interest in the capital stock, of each of the constituent railway companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary in aid of such railway companies or to enhance the value of their stocks. In this manner the interest of individual stockholders in the property and franchises of the two independent and competing railway companies were to be converted into an interest in the property and franchises of the holding corporation. Thus, " by making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each system in a common body, to wit, the holding corporation, with not only the power but the duty to pursue a policy which would promote the interests, not of one system at the expense of the other, but of both at the expense of the

public, all inducements for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established."

In pursuance of this combination and to effect its objects, the defendant, the Northern Securities Company, was organized November 13th 1901, under the laws of New Jersey.

Its certificate of incorporation stated that the objects for which the company were formed were: "1. To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country. 2. To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and while owner thereof to exercise all the rights, powers and privileges of ownership. 3. To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and while owner of such stock to exercise all the rights, powers and privileges of ownership, including the right to vote thereon. 4. To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation, and to do any acts or things designed to protect, preserve, improve or enhance the value of any such bonds or other securities or evidences of indebtedness or stock. 5. To acquire, own and hold such real and personal property as may be necessary or convenient for the transaction of its business."

It was declared in the certificate that the business or purpose of the corporation was from time to time to do any one or more of such acts and things, and that the corporation should have power to conduct its business in other States and in foreign countries, and to have one or more offices, and hold,

purchase, mortgage and convey real and personal property, out of New Jersey.

The total authorized capital stock of the corporation was fixed at $400,000,000, divided into 4,000,000 shares of the par value of $100 each. The amount of the capital stock with which the corporation should commence business was fixed at $30,000. The duration of the corporation was to be perpetual.

This charter having been obtained, Hill and his associate stockholders of the Great Northern Railway Company, and Morgan and associate stockholders of the Northern Pacific Railway Company, assigned to the Securities Company a controlling amount of the capital stock of the respective constituent companies upon an agreed basis of exchange of the capital stock of the Securities Company for each share of the capital stock of the other companies.

In further pursuance of the combination, the Securities Company acquired additional stock of the defendant railway companies, issuing in lieu thereof its own stock upon the above basis, and, at the time of the bringing of this suit, held, as owner and proprietor, substantially all the capital stock of the Northern Pacific Railway Company, and, it is alleged, a controlling interest in the stock of the Great Northern Railway Company, "and is voting the same and is collecting the dividends thereon, and in all respects is acting as the owner thereof, in the organization, management and operation of said railway companies and in the receipt and control of their earnings."

No consideration whatever, the bill alleges, has existed or will exist, for the transfer of the stock of the defendant railway companies to the Northern Securities Company, other than the issue of the stock of the latter company for the purpose, after the manner, and upon the basis stated.

The Securities Company, the bill also alleges, was not organized in good faith to purchase and pay for the stocks of the Great Northern and Northern Pacific Railway Companies, but solely "to incorporate the pooling of the stocks of said companies," and carry into effect the above combination; that it is a mere depositary, custodian, holder or trustee of the stocks of the Great Northern and Northern Pacific Railway Companies; that its shares of stock are but beneficial certifi-

cates against said railroad stocks to designate the interest of the holders in the pool; that it does not have and never had any capital to warrant such an operation; that its subscribed capital was but $30,000, and its authorized capital stock of $400,000,000 was just sufficient, when all issued, to represent and cover the exchange value of substantially the entire stock of the Great Northern and Northern Pacific Railway Companies, upon the basis and at the rate agreed upon, which was about $122,000,000 in excess of the combined capital stock of the two railway companies taken at par; and that, unless prevented, the Securities Company would acquire as owner and proprietor substantially all the capital stock of the Great Northern and Northern Pacific Railway Companies, issuing in lieu thereof its own capital stock to the full extent of its authorized issue, of which, upon the agreed basis of exchange, the former stockholders of the Great Northern Railway Company have received or would receive and hold about fifty-five per cent., the balance going to the former stockholders of the Northern Pacific Railway Company.

The Government charges that if the combination was held not to be in violation of the act of Congress, then all efforts of the National Government to preserve to the people the benefits of free competition among carriers engaged in interstate commerce will be wholly unavailing, and all transcontinental lines, indeed the entire railway systems of the country, may be absorbed, merged and consolidated, thus placing the public at the absolute mercy of the holding corporation.

The several defendants denied all the allegations of the bill imputing to them a purpose to evade the provisions of the act of Congress, or to form a combination or conspiracy having for its object either to restrain or to monopolize commerce or trade among the States or with foreign nations. They denied that any combination or conspiracy was formed in violation of the act.

In our judgment, the evidence fully sustains the material allegations of the bill, and shows a violation of the act of Congress, in so far as it declares illegal every combination or conspiracy in restraint of commerce among the several States and with foreign nations, and forbids attempts to monopolize such commerce or any part of it.

Summarizing the principal facts, it is indisputable upon this record that under the leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound combined and conceived the scheme of organizing a corporation under the laws of New Jersey, which should *hold* the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—more properly speaking, the custodian—of more than nine-tenths of the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation. The stockholders of these two competing companies disappeared, as such, for the moment, but immediately reappeared as stockholders of the holding company which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held *in one ownership.* Necessarily by this combination or arrangement the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation, by the name of a holding corporation, the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combination under which competition between the constituent companies would cease. Those who were stockholders of the Great Northern and Northern Pacific and be-

came stockholders in the holding company are now interested in preventing all competition between the two lines, and as owners of stock or of certificates of stock in the holding company, they will see to it that no competition is tolerated. They will take care that no persons are chosen directors of the holding company who will permit competition between the constituent companies. The result of the combination is that all the earnings of the constituent companies make a common fund in the hands of the Northern Securities Company to be distributed, not upon the basis of the earnings of the respective constituent companies, each acting exclusively in its own interests, but upon the basis of the certificates of stock issued by the holding company. No scheme or device could more certainly come within the words of the act—"combination in the form of a trust or otherwise . . in restraint of commerce among the several States or with foreign nations,"—or could more effectively and certainly suppress free competition between the constituent companies. This combination is, within the meaning of the act, a "trust;" but if not, it is a *combination in restraint of interstate and international commerce;* and that is enough to bring it under the condemnation of the act. The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected. If such combination be not destroyed, all the advantages that would naturally come to the public under the operation of the general laws of competition, as between the Great Northern and Northern Pacific Railway Companies, will be lost, and the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific at Puget Sound will be at the mercy of a single holding corporation, organized in a State distant from the people of that territory.

The Circuit Court was undoubtedly right when it said—all the Judges of that court concurring—that the combination referred to "led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of both companies; second, it destroyed every motive for competition between two

roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies." 120 *Fed. Rep.* 721, 724.

Such being the case made by the record, what are the principles that must control the decision of the present case? Do former adjudications determine the controlling questions raised by the pleadings and proofs?

The contention of the Government is that, if regard be had to former adjudications, the present case must be determined in its favor. That view is contested and the defendants insist that a decision in their favor will not be inconsistent with anything heretofore decided and would be in harmony with the act of Congress.

Is the act to be construed as forbidding every combination or conspiracy in restraint of trade or commerce among the States or with foreign nations? Or, does it embrace only such restraints as are unreasonable in their nature? Is the motive with which a forbidden combination or conspiracy was formed at all material when it appears that the necessary tendency of the particular combination or conspiracy in question is to restrict or suppress free competition between competing railroads engaged in commerce among the States? Does the act of Congress prescribe, as a *rule* for *interstate* or *international* commerce, that the operation of the natural laws of competition between those engaged in *such* commerce shall not be restricted or interfered with by any contract, combination or conspiracy? How far may Congress go in regulating the affairs or conduct of State corporations engaged as carriers in commerce among the States or of State corporations which, although not directly engaged themselves in *such* commerce, yet have control of the business of interstate carriers? If State corporations, or their stockholders, are found to be parties to a combination, in the form of a trust or otherwise, which restrains interstate or international commerce, may they not be compelled to respect any rule for such commerce that may be lawfully prescribed by Congress?

These questions were earnestly discussed at the bar by able counsel, and have received the full consideration which their importance demands.

The first case in this court arising under the Anti-Trust act

was *United States* v. *E. C. Knight Co.*, 156 *U. S.* 1. The next case was that of *United States* v. *Trans-Missouri Freight Association*, 166 *U. S.* 290. That was followed by *United States* v. *Joint Traffic Association*, 171 *U. S.* 505, 569, 571, *Hopkins* v. *United States*, 171 *U. S.* 578, *Anderson* v. *United States*, 171 *U. S.* 604, *Addystone Pipe & Steel Co.* v. *United States*, 175 *U. S.* 211, and *Montague* v. *Lowry*, 193 U. S. *ante*. To these may be added *Pearsall* v. *Great Northern Railway*, 161 *U. S.* 646, which, although not arising under the Anti-Trust act, involved an agreement under which the Great Northern and Northern Pacific Railway Companies should be consolidated and by which competition between those companies was to cease. In *United States* v. *E. C. Knight Co.* it was held that the agreement or arrangement there involved had reference only to the *manufacture* or *production* of sugar by those engaged in the alleged combination, but if it had directly embraced interstate or international commerce, it would then have been covered by the Anti-Trust act and would have been illegal; in *United States* v. *Trans-Missouri Freight Association*, that an agreement between certain railroad companies providing for establishing and maintaining, for their mutual protection, reasonable rates, rules and regulations in respect of freight traffic, through and local, and by which free competition among those companies was restricted, was, by reason of such restriction, illegal under the Anti-Trust act; in *United States* v. *Joint Traffic Association*, that an arrangement between certain railroad companies in reference to railroad traffic among the States, by which the railroads involved were not subjected to competition among themselves, was also forbidden by the act; in *Hopkins* v. *United States* and *Anderson* v. *United States*, that the act embraced only agreements that had direct connection with interstate commerce, and that such commerce comprehended intercourse for all the purposes of trade, in any and all its forms, including the transportation, purchase, sale and exchange of commodities between citizens of different States, and the power to regulate it embraced all the instrumentalities by which such commerce is conducted; in *Addystone Pipe & Steel Co.* v. *United States*, all the members of the court concurring, that the act of Congress made illegal an agreement between certain private companies or corporations engaged in different States in the manufacture, sale and transportation of iron pipe,

whereby competition among them was avoided, was covered by the Anti-Trust act; and in *Montague* v. *Lowry*, all the members of the court again concurring, that a combination created by an agreement between certain private manufacturers and dealers in tiles, grates and mantels, in different States, whereby they controlled or sought to control the price of such articles in those States, was condemned by the act of Congress. In *Pearsall* v. *Great Northern Railway*, which, as already stated, involved the consolidation of the Great Northern and Northern Pacific Railway Companies, the court said: "The consolidation of these two great corporations will unavoidably result in giving to the defendant [the Great Northern] a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota Legislature of 1874 and 1881 undoubtedly reflected the general sentiment of the public, that their best security is in competition."

We will not incumber this opinion by extended extracts from the former opinions of this court. It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are:

That although the act of Congress known as the Anti-Trust act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates *in restraint* of trade or commerce *among the several States or with foreign nations;*

That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all* direct *restraints* imposed by any combination, conspiracy or monopoly upon such trade or commerce;

That railroad carriers engaged in interstate or international trade or commerce are embraced by the act;

That combinations even among *private* manufacturers or dealers whereby *interstate or international commerce* is restrained are equally embraced by the act;

That Congress has the power to establish *rules* by which *interstate and international* commerce shall be governed, and, by the Anti-Trust act, has prescribed the rule of free competition among those engaged in such commerce;

That *every* combination or conspiracy which would extinguish competition between otherwise competing railroads, engaged in *interstate trade or commerce*, and which would *in that way* restrain *such* trade or commerce, is made illegal by the act;

That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition, restrains instead of promoting trade and commerce;

That to vitiate a combination, such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition;

That the constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in *interstate and international* commerce; and,

That under its power to regulate commerce among the several States and with foreign nations, Congress had authority to enact the statute in question.

No one, we assume, will deny that these propositions were distinctly announced in the former decisions of this court. They cannot be ignored or their effect avoided by the intimation that the court indulged in *obiter dicta*. What was said in those cases was within the limits of the issues made by the parties. In our opinion, the recognition of the principles announced in former cases must, under the conceded facts, lead to an affirmance of the decree below, unless the special objections, or some of them, which have been made to the application of the act of Congress to the present case are of a substantial character. We will now consider those objections.

Underlying the argument in behalf of the defendants is the idea that as the Northern Securities Company is a

State corporation, and as its acquisition of the stock of the Great Northern and Northern Pacific Railway Companies is not inconsistent with the powers conferred by its charter the enforcement of the act of Congress, as against those corporations, will be an unauthorized interference by the national government with the internal commerce of the States creating those corporations. This suggestion does not at all impress us. There is no reason to suppose that Congress had any purpose to interfere with the internal affairs of the States, nor, in our opinion, is there any ground whatever for the contention that the Anti-Trust act regulates their domestic commerce. By its very terms the act regulates only commerce among the States and with foreign States. Viewed in that light, the act, if within the powers of Congress, must be respected; for, by the explicit words of the Constitution, that instrument and the laws enacted by Congress in pursuance to its provisions, are the Supreme Law of the Land, "anything in the constitution or laws of any State to the contrary notwithstanding"—supreme over the States, over the courts, and even over the People of the United States, the source of all power under our governmental system in respect of the objects for which the National Government was ordained. An act of Congress constitutionally passed under its power to regulate commerce among the States and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a State court, is under the obligations of an oath so to regard a lawful enactment of Congress. Not even a State, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the Government and its laws might be prostrated at the feet of local authority. *Cohens* v. *Virginia*, 6 *Wheat.* 264, 385, 414. These views have been often expressed by this court.

It is said that whatever may be the power of a State over such subjects Congress cannot forbid single individuals from disposing of their stock in a State corporation, even if such corporation be engaged in interstate and international commerce; that the holding or purchase by a State corporation, or the purchase by individuals, of the stock of another corporation, for whatever purpose, are matters in respect of which

Congress has no authority under the Constitution; that, so far as the power of Congress is concerned, citizens or State corporations may dispose of their property and invest their money in any way they choose; and that in regard to all such matters, citizens and State corporations are subject, if to any authority, only to the lawful authority of the State in which such citizens reside, or under whose laws such corporations are organized. It is unnecessary in this case to consider such abstract, general questions. The court need not now concern itself with them. They are not here to be examined and determined, and may well be left for consideration in some case necessarily involving their determination.

In this connection, it is suggested that the contention of the Government is that the acquisition and *ownership* of stock in a State railroad corporation is itself interstate commerce, if that corporation be engaged in interstate commerce. This suggestion is made in different ways, sometimes in express words, at other times by implication. For instance, it is said that the question here is whether the power of Congress over interstate commerce extends to the regulation of the ownership of the stock in State railroad companies, by reason of their being engaged in such commerce. Again, it is said that the only issue in this case is whether the Northern Securities Company can acquire and hold stock in other State corporations. Still further, it is asked, generally, whether the organization or ownership of railroads is not under the control of the States under whose laws they came into existence? Such statements as to the issues in this case are, we think, wholly unwarranted and are very wide of the mark; it is the setting up of mere men of straw to be easily stricken down. We do not understand that the Government makes any such contentions or takes any such positions as those statements imply. It does not contend that Congress may control the mere acquisition or the mere ownership of stock in a State corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of State corporations authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful and not prohibited

by the Constitution. It does contend that no State corporation can stand in the way of the enforcement of the national will, legally expressed. What the Government particularly complains of, indeed, all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies which in violation of the act of Congress restrains interstate and international commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them. Independently of any question of the mere ownership of stock or the organization of a State corporation, can it in reason be said that such a combination is not embraced by the very terms of the Anti-Trust act? May not Congress declare that *combination* to be illegal? If Congress legislates for the protection of the public, may it not proceed on the ground that wrongs when effected by a powerful combination are more dangerous and require more stringent supervision than when they are to be effected by a single person? *Callan* v. *Wilson*, 127 *U. S.* 540, 556. How far may the courts go in order to give effect to the act of Congress, and remedy the evils it was designed by that act to suppress? These are confessedly questions of great moment, and they will now be considered.

By the express words of the Constitution, Congress has power to "regulate commerce with foreign nations and among the several States, and with the Indian tribes." In view of the numerous decisions of this court there ought not, at this day, to be any doubt as to the general scope of such power. In some circumstances regulation may properly take the form and have the effect of prohibition. *In re Rahrer*, 140 *U. S.* 545; *Lottery Case*, 188 *U. S.* 321, 355, *and authorities there cited.* Again and again this court has reaffirmed the doctrine announced in the great judgment rendered by Chief Justice MARSHALL for the court in *Gibbons* v. *Ogden*, 9 *Wheat.* 1, 196, 197, that the power of Congress to regulate commerce among the States and with foreign nations is the power "to prescribe the *rule* by which commerce *is to be governed;*" that such power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;" that "if, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those

objects, the power over commerce with foreign nations and among the several States, is vested in Congress *as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States;*" that a sound construction of the Constitution allows to Congress a large discretion, "with respect to the means by which the powers it confers are to be carried into execution, which enable that body to perform the high duties assigned to it, in the manner most beneficial to the people;" and that if the end to be accomplished is within the scope of the Constitution, "all means which are appropriate, which are plainly adapted to that end and which are not prohibited, are constitutional." *Brown* v. *Maryland*, 12 *Wheat.* 419; *Sinnot* v. *Davenport*, 22 *How.* 227, 238; *Henderson* v. *The Mayor*, 92 *U. S.* 259; *Railroad* v. *Husen*, 95 *U. S.* 465, 472; *Mobile* v. *Kimball*, 102 *U. S.* 691; *M., K. & Texas Ry. Co.* v. *Haber*, 169 *U. S.* 613, 626; *The Lottery Case*, 188 *U. S.* 321, 348. In *Cohens* v. *Virginia*, 6 *Wheat.* 264, 413, this court said that the United States were for many important purposes "a single nation," and that "in all commercial regulations we are one and the same people;" and it has since frequently declared that commerce among the several States was a *unit*, and subject to national control. Previously, in *McCullock* v. *Maryland*, 4 *Wheat.* 316, 405, the court had said that the Government ordained and established by the Constitution was, within the limits of the powers granted to it, "the Government of all; its powers are delegated by all; it represents all, and acts for all," and was "supreme within its sphere of action." As late as the case of *In re Debs*, 158 *U. S.* 564, 582, this court, every member of it concurring, said: "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws."

The means employed in respect of the combinations for-

bidden by the Anti-Trust act, and which Congress deemed germane to the end to be accomplished, was to prescribe as *a rule* for *interstate and international* commerce, (not for domestic commerce,) that it should not be vexed by combinations, conspiracies or monopolies which restrain commerce by destroying or restricting competition. We say that Congress has prescribed such a rule, because in all the prior cases in this court the Anti-Trust act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men.

It is said that railroad corporations created under the laws of a State can only be consolidated with the authority of the State. Why that suggestion is made in this case we cannot understand, for there is no pretence that the combination here in question was under the authority of the States under whose laws these railroad corporations were created. But even if the State allowed consolidation it would not follow that the

stockholders of two or more State railroad corporations, having *competing lines and engaged in interstate commerce*, could lawfully combine and form a distinct corporation to hold the stock of the constituent corporations, and, by destroying competition between them, in violation of the act of Congress, restrain commerce among the States and with foreign nations?

The rule of competition, prescribed by Congress, was not at all new in trade and commerce. And we cannot be in any doubt as to the reason that moved Congress to the incorporation of that rule into a statute. That reason was thus stated in *United States* v. *Joint Traffic Association:* "Has not Congress with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has. . . It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting *as one body* in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, *so far as the combination operates upon and restrains interstate commerce*, Congress has power to legislate and to prohibit." (*pp.* 569, 571.) That such a rule was applied to interstate commerce should not have surprised any one. Indeed, when Congress declared contracts, combinations and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than apply to interstate commerce a rule that had been long applied by the several States when dealing with combinations that were in restraint of their domestic commerce. The decisions in State courts upon this general subject are not only numerous and instructive but they show the circumstances under which the Anti-Trust act was passed. It may well be assumed that Congress, when enacting that statute, shared the general apprehension that a few powerful corporations or combinations sought to obtain, and, unless restrained, would obtain such absolute control of the entire trade and commerce of the country as would be detrimental to the general welfare.

In *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 *Penn. St.* 173, 186, the Supreme Court of Pennsylvania dealt with a

combination of coal companies seeking the control within a large territory of the entire market for bituminous coal. The court, observing that the combination was wide in its scope, general in its influence, and injurious in its effects, said: "When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire productions. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi Rivers, and from Pennsylvania to the Lakes. This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended the demand for it becomes importunate, and prices must rise. Or if the supply goes forward, the prices fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master and the fires of the manufacturer all feel the restraint, while many dependent hands are paralyzed and hungry mouths are stinted. The influence of a lack of supply or a rise in the price of an article of such prime necessity cannot be measured. It permeates the entire mass of the community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract; it is an offense. . . In all such combinations where the purpose is injurious or unlawful, the gist of the offense is the conspiracy. Men can often do by the *combination* of many what severally no one could accomplish, and even what when done by one would be innocent. . . *There is a potency in numbers when combined*, which the law cannot overlook, where injury is the consequence." The same principles were applied in *Arnot* v. *Pittston & Elmira Coal Co.*, 68 *N. Y.* 558, 565, which was the case of a combination of two coal companies, in order to give one of them a monopoly of coal in a particular region, the Court of Appeals of New York holding that "a combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal." They were also applied by the Supreme Court of Ohio in *Cen-*

tral Ohio Salt Co. v. *Guthrie*, 35 *O. St.* 666, 672, which was the case of a combination among manufacturers of salt in a large salt-producing territory, the court saying: "It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. *Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public.*"

So, in *Craft* v. *McConoughy*, 79 *Ill.* 346, 350, which was the case of a combination among grain dealers by which competition was stifled, the court saying: "So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the right of competition, were all the guaranty the public required, but the secret combination created by the contract destroyed all competition and created a monopoly against which the public interest had no protection." Again, in *People* v. *Chicago Gas Trust Co.*, 130 *Ill.* 269, 297, which involved the validity of the organization of a gas corporation which obtained a monopoly in the business of furnishing illuminating gas in the city of Chicago by buying the stock of four other gas companies, it was said: "Of what avail is it that any number of gas companies may be formed under the general incorporation law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and, through the control thereby attained, can direct all their operations and weld them into one huge combination?" To the same effect are cases almost too numerous to be cited. But among them we refer to *Richardson* v. *Buhl*, 77 *Mich.* 632, which was the case of the organization of a corporation in Connecticut to unite in one corporation all the match manufacturers in the United States, and thus obtain control of the business of manufacturing matches; *Santa Clara Mill & Lumber Co.* v. *Hayes*, 76 *Cal.* 387, 390, which was the case of a combination among manufacturers of lumber, by which it could control the business in certain localities; and *India Bagging Association* v. *Kock*, 14 *La. Ann.* 168, which was the case of a combination among various commercial firms to control the prices of bagging used by cotton planters.

The cases, just cited, it is true, relate to the domestic

commerce of the States. But they serve to show the authority which the States possess to guard the public against *combinations* that repress individual enterprise and interfere with the operation of the natural laws of competition among those engaged in trade within its limits. They serve also to give point to the declaration of this court in *Gibbons* v. *Ogden*, 9 *Wheat.* 194—a principle never modified by any subsequent decision—that, subject to the limitations imposed by the Constitution upon the exercise of the powers granted by that instrument, "the power over commerce with foreign nations and among the several States is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of power as are found in the Constitution of the United States." Is there, then, any escape from the conclusion that, subject only to such restrictions, the power of Congress over interstate and international commerce is as full and complete as is the power of any State over its domestic commerce? If a State may strike down combinations that restrain its domestic commerce by destroying free competition among those engaged in such commerce, what power, except that of Congress, is competent to protect the freedom of interstate and international commerce when assailed by a combination that restrains such commerce by stifling competition among those engaged in it.

Now, the court is asked to adjudge that, if held to embrace the case before us, the Anti-Trust act is repugnant to the Constitution of the United States. In this view we are unable to concur. The contention of the defendants could not be sustained without, in effect, overruling the prior decisions of this court as to the scope and validity of the Anti-Trust act. If, as the court has held, Congress can strike down a combination between private persons or private corporations that restrains trade among the States in iron pipe, (as in *Addystone Pipe & Steel Co.* v. *United States*,) or in tiles, grates and mantels, (as in *Montague* v. *Lowry*,) surely it ought not to be doubted that Congress has power to declare illegal a combination that restrains commerce among the States, and with foreign nations, as carried on over the lines of competing railroad companies exercising public franchises, and engaged in such commerce. We cannot agree that

Congress may strike down combinations among manufacturers and dealers in iron pipe, tiles, grates and mantels that restrain commerce among the States in such articles, but may not strike down combinations among stockholders of competing railroad carriers, which restrain commerce as involved in the transportation of passengers and property among the several States. If private parties may not, by combination among themselves, restrain interstate and international commerce in violation of an act of Congress, much less can such restraint be tolerated when imposed or attempted to be imposed upon commerce as carried on over public highways. Indeed, if the contentions of the defendants are sound why may not *all* the railway companies in the United States, that are engaged, under State charters, in interstate and international commerce, enter into a combination such as the one here in question, and by the device of a holding corporation obtain the absolute control throughout the entire country of rates for passengers and freight, beyond the power of Congress to protect the public against their exactions? The argument in behalf of the defendants necessarily leads to such results, and places Congress, although invested by the People of the United States with full authority to regulate interstate and international commerce, in a condition of utter helplessness, so far as the protection of the public against such combinations is concerned.

Will it be said that Congress can meet such emergencies by prescribing the rates by which interstate carriers shall be governed in the transportation of freight and passengers? If Congress has the power to fix such rates—and upon that question we express no opinion—it does not choose to exercise its power in that way or to that extent. It has, all will agree, a large discretion as to the means to be employed in the exercise of any power granted to it. For the present, it has determined to go no farther than to protect the freedom of commerce among the States and with foreign States by declaring illegal all contracts, combinations, conspiracies or monopolies in restraint of such commerce, and make it a public offense to violate the rule thus prescribed. How much further it may go, we do not now say. We need only at this time consider whether it has exceeded its powers in enacting the statute here in question.

Assuming, without further discussion, that the case before us is within the terms of the act, and that the act is not in excess of the powers of Congress, we recur to the question, how far may the courts go in reaching and suppressing the combination described in the bill? All will agree that if the Anti-Trust act be constitutional, and if the combination in question is in violation of its provisions, the courts may enforce the provisions of the statute by such orders and decrees as are necessary or appropriate to that end and as may be consistent with the fundamental rules of legal procedure. And all, we take it, will agree, as established firmly by the decisions of this court, that the power of Congress over commerce extends to all the instrumentalities of such commerce, and to every device that may be employed to interfere with the freedom of commerce among the States and with foreign nations. Equally, we assume, all will agree that the Constitution and the legal enactments of Congress are, by express words of the Constitution, the supreme law of the land, anything in the constitution and laws of any State to the contrary notwithstanding. Nevertheless, the defendants, strangely enough, invoke in their behalf the Tenth Amendment of the Constitution which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the People"; and we are confronted with the suggestion that any order or decree of the Federal court which will prevent the Northern Securities Company from exercising the power it acquired in becoming the holder of the stocks of the Great Northern and Northern Pacific Railway Companies will be an invasion of the rights of the State under which the Securities Company was chartered, as well as of the rights of the States creating the other companies. In other words, if the State of New Jersey gives a charter to a corporation, and even if the obtaining of such charter is in fact pursuant to a *combination* under which it becomes the holder of the stocks of shareholders in two competing, parallel railroad companies engaged in interstate commerce in other States, whereby competition between the respective roads of those companies is to be destroyed and the enormous commerce carried on over them restrained by suppressing competition, Congress must stay its hands and allow such re-

straint to continue to the detriment of the public because, forsooth, the corporations concerned or some of them are State corporations. We cannot conceive how it is possible for any one to seriously contend for such a proposition. It means nothing less than that Congress, in regulating interstate commerce, must act in subordination to the will of the States when exerting their power to create corporations. No such view can be entertained for a moment.

It is proper to say in passing that nothing in the record tends to show that the State of New Jersey had any reason to suspect that those who took advantage of its liberal incorporation laws had in view, when organizing the Securities Company, to destroy competition between two great railway carriers engaged in interstate commerce in distant States of the Union. The purpose of the combination was concealed under very general words that gave no clue whatever to the real purposes of those who brought about the organization of the Securities Company. If the certificate of the incorporation of that company had expressly stated that the object of the company was to destroy competition between competing, parallel lines of interstate carriers, all would have seen, at the outset, that the scheme was in hostility to the national authority, and that there was a purpose to violate or evade the act of Congress.

We reject any such view of the relations of the National Government and the States composing the Union, as that for which the defendants contend. Such a view cannot be maintained without destroying the just authority of the United States. It is inconsistent with all the decisions of this court as to the powers of the National Government over matters committed to it. No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce. It cannot be said that any State may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is neces-

sarily subject to the Supreme Law of the Land. And yet the suggestion is made that to restrain a State corporation from interfering with the free course of trade and commerce among the States, in violation of an act of Congress, is hostile to the reserved rights of the States. The Federal court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company. But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce. The Securities Company is itself a part of the present combination; its head and front; its trustee. It would be extraordinary if the court, in executing the act of Congress, could not lay hands upon that company and prevent it from doing that which, if done, will defeat the act of Congress. Upon like grounds the court can, by appropriate orders, prevent the two competing railroad companies here involved from co-operating with the Securities Company in restraining commerce among the States. In short, the court may make any order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce. All this can be done without infringing in any degree upon the just authority of the States. The affirmance of the judgment below will only mean that no combination, however powerful, is stronger than the law or will be permitted to avail itself of the pretext that to prevent it doing that which, if done, would defeat a legal enactment of Congress, is to attack the reserved rights of the States. It would mean that the Government which represents all, can, when acting within the limits of its powers, compel obedience to its authority. It would mean that no device in evasion of its provisions, however skillfully such device may have been contrived, and no combination, by whomsoever formed, is beyond the reach of the supreme law of the land, if such device or combination by its operation directly restrains commerce among the States or with foreign nations in violation of the act of Congress.

The defendants rely, with some confidence, upon the case of the *Baltimore & Ohio R. R. Co.* v. *Maryland*, 21 *Wall.* 456, 473. But nothing we have said is inconsistent with any principle announced in that case. The court there recognized the principle that a State has plenary powers "over its own territory, its highways, its franchises, and its corporations," and observed that "we are bound to sustain the constitutional powers and prerogatives of the State, as well as those of the United States, whenever they are brought before us for adjudication, no matter what may be the consequences." Of course, every State has, in a general sense, plenary power over its corporations. But is it conceivable that a State, when exerting power over a corporation of its creation, may prevent or embarrass the exercise by Congress of any power with which it is invested by the Constitution? In the case just referred to the court does not say, and it is not to be supposed that it will ever say, that any power exists with a State to prevent the enforcement of a lawful enactment of Congress, or to invest any of its corporations, in whatever business engaged, with authority to disregard such enactment or defeat its legitimate operation. On the contrary, the court has steadily held to the doctrine, vital to the United States as well as to the States, that a State enactment, even if passed in the exercise of its acknowledged powers, must yield, in case of conflict, to the supremacy of the Constitution of the United States and the acts of Congress enacted in pursuance of its provisions. This results, the court has said, as well from the nature of the Government as from the words of the Constitution. *Gibbons* v. *Ogden*, 9 *Wheat.* 1, 210; *Sinnot* v. *Davenport*, 22 *How.* 227, 243; *In re Debs*, 158 *U. S.* 564; *Missouri, Kansas & Texas Railway* v. *Haber*, 169 *U. S.* 613, 626-7. In *Texas* v. *White*, 7 *Wall.* 700, 725, the court remarked "that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' *County of Lane* v. *Oregon*, 7 *Wall.* 76. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much

within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government." These doctrines are at the basis of our Constitutional Government, and cannot be disregarded with safety.

The defendants also rely on *Louisville & Nashville Ry.* v. *Kentucky*, 161 *U. S.* 677, 702. In that case it was contended by the railroad company that the assumption of the State to forbid the consolidation of parallel and competing lines was an interference with the power of Congress over interstate commerce. The court observed that but little need be said in answer to such a proposition, for "it has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers." But that case distinctly recognized that there was a division of power between Congress and the States in respect to interstate railways, and that Congress had the superior right to control that commerce and forbid interference therewith, while to the States remained the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests. If there is anything in that case which even intimates that a State or a State corporation may in any way directly restrain interstate commerce, over which Congress has, by the Constitution, complete control, we have been unable to find it.

The question of the relations of the General Government with the States is again presented by the specific contention of each defendant that Congress did not intend "to limit the power of the several States to create corporations, define their purposes, fix the amount of their capital, and determine who may buy, own and sell their stock." All that is true, generally speaking, but the contention falls far short of meeting the controlling questions in this case. To meet this contention we must repeat some things already said in this opinion. But if what we have said be sound, repetition will do no harm. So far as the Constitution of the United States is concerned, a State may, indeed, create a corporation, define its powers, prescribe the amount of its stock and the mode in which it may be transferred. It may even authorize one of its corporations to engage in commerce of every kind; domestic, interstate and

international. The regulation or control of purely domestic commerce of a State is, of course, with the State, and Congress has no direct power over it so long as what is done by the State does not interfere with the operations of the General Government, or any legal enactment of Congress. A State, if it chooses so to do, may even submit to the existence of combinations within its limits that restrain its internal trade. But neither a State corporation nor its stockholders can, by reason of the non-action of the State or by means of any combination among such stockholders, interfere with the complete enforcement of any rule lawfully devised by Congress for the conduct of commerce among the States or with foreign nations; for, as we have seen, interstate and international commerce is by the Constitution under the control of Congress, and it belongs to the legislative department of the Government to prescribe rules for the conduct of that commerce. If it were otherwise, the declaration in the Constitution of its supremacy, and of the supremacy as well of the laws made in pursuance of its provisions, was a waste of words. Whilst every instrumentality of domestic commerce is subject to State control, every instrumentality of interstate commerce may be reached and controlled by national authority, *so far as to compel it to respect the rules for such commerce lawfully established by Congress.* No corporate person can excuse a departure from or violation of that rule under the plea that that which it has done or omitted to do is permitted or not forbidden by the State under whose authority it came into existence. We repeat that no State can endow any of its corporations, or any combination of its citizens, with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress. So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or secured by that instrument, its regulations of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all. Harm and only harm can come from the failure of the courts to recognize this fundamental principle of constitutional construction. To depart from it because of the circumstances of special cases, or because the rule, in its operation, may possibly affect the interests of business, is to endanger the safety and in-

tegrity of our institutions and make the Constitution mean not what it says but what interested parties wish it to mean at a particular time and under particular circumstances. The supremacy of the law is the foundation rock upon which our institutions rest. The law, this court said in *United States* v. *Lee*, 106 *U. S.* 196, 220, is the only supreme power in our system of Government. And no higher duty rests upon this court than to enforce, by its decrees, the will of the legislative department of the Government, as expressed in a statute, unless such statute be plainly and unmistakably in violation of the Constitution. If the statute is beyond the constitutional power of Congress, the court would fail in the performance of a solemn duty if it did not so declare. But if nothing more can be said than that Congress has erred—and the court must not be understood as saying that it has or has not erred—the remedy for the error and the attendant mischief is the selection of new Senators and Representatives, who, by legislation, will make such changes in existing statutes, or adopt such new statutes, as may be demanded by their constituents and be consistent with law.

Many suggestions were made in argument based upon the thought that the Anti-Trust act would in the end prove to be mischievous in its consequences. Disaster to business and wide-spread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified. It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions. In this, as in former cases, they seek shelter behind the reserved rights of the States and even behind the constitutional guarantee of liberty of contract. But this court has heretofore adjudged that the act of Congress did not touch the rights of the States, and that liberty of contract did not involve a right to deprive the public of the advantages of free competition in trade and commerce. Liberty of contract does not imply liberty in a corporation or individuals to defy the national will, when legally expressed. Nor does the enforcement of a legal enactment of Congress infringe, in any proper sense,

the general inherent right of every one to acquire and hold property. That right, like all other rights, must be exercised in subordination to the law.

But even if the court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legislative branch of the Government if what it has done is within the limits of its constitutional power. The suggestions of disaster to business have, we apprehend, their origin in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case ; at any rate, the suggestions imply that the court may and ought to refuse the enforcement of the provisions of the act if, in its judgment, Congress was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of such commerce and the monopolizing or attempting to monopolize such commerce shall be illegal. These, plainly, are questions as to the policy of legislation which belong to the legislative department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy. We need only say that Congress has authority to declare, and by the language of its act, as interpreted in prior cases, has, in effect declared, that the freedom of interstate and international commerce shall not be obstructed or disturbed by any combination, conspiracy or monopoly that will restrain such commerce, by preventing the free operation of competition among interstate carriers engaged in the transportation of passengers and freight. This court cannot disregard that declaration unless Congress, in passing the statute in question, be held to have transgressed the limits prescribed for its action by the Constitution. But, as already indicated, it cannot be so held consistently with the provisions of that instrument.

The combination here in question may have been for the pecuniary benefit of those who formed or caused it to be formed. But the interests of private persons and corporations cannot be made paramount to the interests of the general public. Under the Articles of Confederation commerce among the original States was subject to vexatious and local regulations that took no account of the general welfare.

But it was for the protection of the general interests, as involved in interstate and international commerce, that Congress, representing the whole country, was given by the Constitution full power to regulate commerce among the States and with foreign nations. In *Brown* v. *Maryland*, 12 *Wheat.* 419, 446, it was said : " Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress." Railroad companies, we said in the *Trans-Missouri Freight Association case*, " are instruments of commerce, and their business is commerce itself." And such companies, it must be remembered, operate " public highways, established primarily for the convenience of the people, and therefore are subject to governmental control and regulation." *Cherokee Nation* v. *Kansas Railway Co.*, 135 *U. S.* 641, 657 ; *Chicago &c. R. R. Co.* v. *Pullman Car Co.*, 139 *U. S.* 79, 90 ; *Interstate Commerce Commission* v. *Brimson*, 154 *U. S.* 447, 475 ; *United States* v. *Freight Association*, 166 *U. S.* 290, 332 ; *Smyth* v. *Ames*, 169 *U. S.* 466, 544 ; *Lake Shore &c.* v. *Ohio*, 173 *U. S.* 285, 301. When such carriers, in the exercise of public franchises, engage in the transportation of passengers and freight among the States they become—even if they be State corporations—subject to such rules as Congress may lawfully establish for the conduct of interstate commerce.

It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations, a purchase of that stock ; which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress. This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact, one

of that kind. However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose. If any one had full knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan. In his testimony he was asked, "Why put the stocks of *both* these [constituent companies] into one holding company?" He frankly answered: "In the first place, this holding company was simply a question of *custodian*, because it had no other alliances." That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a *holding* company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being, as already indicated, to restrain and monopolize interstate commerce by suppressing or (to use the words of this court in *United States* v. *Joint Traffic Association)* "smothering" competition between the lines of two railway carriers.

We will now inquire as to the nature and extent of the relief granted to the Government by the decree below.

By the decree in the Circuit Court it was found and adjudged that the defendants had entered into a combination or conspiracy in restraint of trade or commerce among the several States, such as the act of Congress denounced as illegal; and that all of the stocks of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, claimed to be owned and held by the Northern Securities Company, was acquired, and is by it held, in virtue of such combination or conspiracy, in restraint of trade and commerce among the several States. It was therefore decreed as follows: "That the Northern Securities Company, its officers, agents, servants and employees, be and they are hereby enjoined from acquiring, or attempting

to acquire, further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either the aforesaid railway companies and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents, be and they are hereby respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies; that they, together with their officers, directors, servants and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies, which said, The Northern Securities Company, may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

Subsequently, and before the appeal to this court was perfected, an order was made in the Circuit Court to this

effect: "That upon the giving of an approved bond to the United States by or on behalf of the defendants in the sum of fifty thousand dollars conditioned to prosecute their appeal with effect and to pay all damages which may result to the United States from this order, that portion of the injunction contained in the final decree herein which forbids the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents, from paying dividends to the Northern Securities Company on account of stock in either of the railway companies which the Securities Company claims to own and hold, is suspended during the pendency of the appeal allowed herein this day. All other portions of the decree and of the injunction it contains remain in force and are unaffected by this order."

No valid objection can be made to the decree below, in form or in substance. If there was a combination or conspiracy in violation of the act of Congress, between the stockholders of the Great Northern and the Northern Pacific Railway Companies, whereby the Northern Securities Company was formed as a holding corporation, and whereby interstate commerce over the lines of the constituent companies was restrained, it must follow that the court, in execution of that act, and to defeat the efforts to evade it, could prohibit the parties to the combination from doing the specific things which being done would affect the result denounced by the act. To say that the court could not go so far is to say that it is powerless to enforce the act or to suppress the illegal combination, and powerless to protect the rights of the public as against that combination.

It is here suggested that the alleged combination had accomplished its object before the commencement of this suit, in that the Securities Company had then organized, and had actually received a majority of the stock of the two constituent companies; *therefore*, it is argued, no effective relief can now be granted by the Government. This same view was pressed upon the Circuit Court, and was rejected. It was completely answered by that court when it said: "Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the Anti-Trust act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, namely, to restrain

commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it. Obviously the act, when fairly interpreted, will bear no such construction. Congress aimed to destroy the power to place any direct restraint on interstate trade or commerce, when by any combination or conspiracy, formed by either natural or artificial persons, such a power had been acquired; and the Government may intervene and demand relief as well after the combination is fully organized as while it is in process of formation. In this instance, as we have already said, the Securities Company made itself a party to a combination in restraint of interstate commerce that antedated its organization, as soon as it came into existence, doing so, of course, under the direction of the very individuals who promoted it." The Circuit Court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose.

It is said that this statute contains criminal provisions and must therefore be strictly construed. The rule upon that subject is a very ancient and salutary one. It means only that we must not bring cases within the provisions of such a statute that are not clearly embraced by it, nor by narrow, technical or forced construction of words, exclude cases from it that are obviously within its provisions. What must be sought for always is the intention of the legislature, and the duty of the court is to give effect to that intention as disclosed by the words used.

As early as the case of *King* v. *Inhabitants of Hodnett*, 1 *T. R.* 96, 101, Mr. Justice BULLER said: "It is not true that the

courts in the exposition of penal statutes are to narrow the construction." In *United States* v. *Wiltberger*, 5 *Wheat.* 76, 95, Chief Justice MARSHALL, delivering the judgment of this court and referring to the rule that penal statutes are to be construed strictly, said: "It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction." In *United States* v. *Morris*, 14 *Pet.* 464, 475, this court, speaking by Chief Justice TANEY, said: "In expounding a penal statute the court certainly will not extend it beyond the plain meaning of its words; for it has been long and well settled that such statutes must be construed strictly. Yet the evident intention of the legislature ought not to be defeated by a forced and overstrict construction. 5 *Wheat.* 95." So, in *The Schooner Industry*, 1 *Gall.* 114, 117, Mr. Justice STORY said: "We are undoubtedly bound to construe penal statutes strictly, and not to extend them beyond their obvious meaning by strained inferences. On the other hand, we are bound to interpret them according to the manifest import of the words, and to hold all cases which are within the words and the mischiefs to be within the remedial influence of the statute." In another case the same eminent jurist said: "I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication or extended to cases not obviously within their words and purport. . . In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes the best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature." *United States* v. *Winn*, 3 *Sumner*, 209, 211, 212. In *People* v. *Bartow*, 6 *Cowen*, 290, the highest court of New York said: "Although a penal statute is to be construed strictly, the court are not to disregard the plain intent of the legislature. It is well settled

that a statute which is made for the good of the public, ought, although it be penal, to receive an equitable construction." So, in *Commonwealth* v. *Martin*, 17 *Mass.* 359, 362, the highest court of Massachusetts said: "If a statute, creating or increasing the penalty, be capable of two constructions, undoubtedly that construction which operates in favor of life or liberty is to be adopted; but it is not justifiable in this, any more than in any other case, to imagine ambiguities, merely that a lenient construction may be adopted. If such were the privilege of a court, it would be easy to obstruct the public will in almost every statute enacted; for it rarely happens that one is so precise and exact in its terms, as to preclude the exercise of ingenuity in raising doubts about its construction." There are cases almost without number in this country and in England to the same effect.

Guided by these long-established rules of construction, it is manifest that if the Anti-Trust act is held not to embrace a case such as is now before us, the plain intention of the legislative branch of the Government will be defeated. If Congress has not, by the words used in the act, described this and like cases, it would, we apprehend, be impossible to find words that would describe them. This, it must be remembered, is a suit in equity, instituted by authority of Congress "to prevent and restrain violations of the act," § 4; and the court, in virtue of a well settled rule governing proceedings in equity, may mould its decree so as to accomplish practical results—such results as law and justice demands. The defendants have no just cause to complain of the decree, in matter of law, and it should be affirmed.

The judgment of the court is that the decree below be and hereby is affirmed, with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require.

Affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 277.—October Term, 1903.

Northern Securities Company et al., Appellants, vs. The United States.	Appeal from the Circuit Court of the United States for the District of Minnesota.

[March 14, 1904.]

Mr. Justice Brewer concurring:

I cannot assent to all that is said in the opinion just announced, and believe that the importance of the case and the questions involved justify a brief statement of my views.

First, let me say that while I was with the majority of the court in the decision in *United States* v. *Freight Association*, (166 U. S. 290,) followed by the cases of *United States* v. *Joint Traffic Association*, (171 U. S. 505,) *Addystone Pipe & Steel Company* v. *United States*, (175 U. S. 211,) and *Montague & Company* v. *Lowry*, decided at the present term, and while a further examination (which has been induced by the able and exhaustive arguments of counsel in the present case) has not disturbed the conviction that those cases were rightly decided, I think that in some respects the reason given for the judgments cannot be sustained. Instead of holding that the Anti-Trust act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of that act. The act, as appears from its title, was leveled at only "unlawful restraints and monopolies." Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct

restraint of trade, unreasonable and against public policy. Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear and such a departure was not intended.

Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen. If applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company he could not by any act of Congress be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through that ownership a control over both companies. In other words, the right, which all other citizens had, of purchasing Northern Pacific stock could not be denied to him by Congress because of his ownership of stock in the Great Northern Company. Such was the ruling in *Pearsall* v. *Great Northern Railway*, (161 U. S. 646,) in which this court said (p. 671), in reference to the right of the stockholders of the Great Northern Company to purchase the stock of the Northern Pacific Railway Company: "Doubtless these stockholders could lawfully acquire by individual purchase a majority or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common."

But no such investment by a single individual of his means is here presented. There was a combination by several individuals separately owning stock in two competing railroad companies to place the control of both in a single corporation. The purpose to combine and by combination destroy competition existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of $400,000,000, had no means of its own; $30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as well as four hundred,

and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purpose as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the Securities Company was a mere incident, the manner in which the combination to destroy competition and thus unlawfully restrain trade was carried out.

If the parties interested in these two railroad companies can, through the instrumentality of a holding corporation, place both under one control, then in like manner, as was conceded on the argument by one of the counsel for the appellants, could the control of all the railroad companies in the country be placed in a single corporation. Nor need this arrangement for control stop with what has already been done. The holders of $201,000,000 of stock in the Northern Securities Company might organize another corporation to hold their stock in that company, and the new corporation holding the majority of the stock in the Northern Securities Company and acting in obedience to the wishes of a majority of its stockholders would control the action of the Securities Company and through it the action of the two railroad companies, and this process might be extended until a single corporation whose stock was owned by three or four parties would be in practical control of both roads, or, having before us the possibilities of combination, the control of the whole transportation system of the country. I cannot believe that to be a reasonable or lawful restraint of trade.

Again, there is by this suit no interference with State control. It is a recognition rather than a disregard of its action. This merging of control and destruction of competition was not authorized, but specifically prohibited by the State which created one of the railroad companies, and within whose boundaries the lines of both were largely located and much of

their business transacted. The purpose and policy of the State are therefore enforced by the decree. So far as the work of the two railroad companies was interstate commerce, it was subject to the control of Congress, and its purpose and policy were expressed in the act under which this suit was brought.

It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical monopoly, and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly. I cannot look upon it as other than an unreasonable combination in restraint of interstate commerce--one in conflict with State law and within the letter and spirit of the statute and the power of Congress. Therefore I concur in the judgment of affirmance.

I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts and invite unnecessary litigation.

SUPREME COURT OF THE UNITED STATES.

No. 277.—October Term, 1903.

Northern Securities Company et al., Appellants, vs. The United States.	Appeal from the Circuit Court of the United States for the District of Minnesota.

[March 14, 1904.]

Mr. Justice White, with whom concur Mr. Chief Justice Fuller, Mr. Justice Peckham, and Mr. Justice Holmes, dissenting.

The Northern Securities Company is a New Jersey corporation; the Great Northern Railway Company, a Minnesota one; and the Northern Pacific Railway Company, a Wisconsin corporation. Whilst in the argument at bar the government referred to the subject, nevertheless it expressly disclaimed predicating any claim for relief upon the fact that the predecessor in title of the Northern Pacific Railway Company was a corporation created by act of Congress. That fact, therefore, may be eliminated.

The facts essential to be borne in mind to understand my point of view, without going into details, are as follows: The lines of the Northern Pacific and the Great Northern Railway Companies are both transcontinental, that is, trunk lines to the Pacific Ocean, and in some aspects are conceded to be competing. Mr. Morgan and Mr. Hill and a few persons immediately associated with them separately acquired and owned capital stock of the Northern Pacific Railway Company, aggregating a majority thereof. Mr. Hill and others associated with him owned, in the same manner, about one-third of the capital stock of the Great Northern Railway Company, the balance of the stock being distributed among about eighteen hundred stockholders. Although Mr. Hill and his immediate associates owned only one-third of the stock, the confidence reposed in

Mr. Hill was such that, through proxies, his influence was dominant in the affairs of that company. Under these circumstances Mr. Morgan and Mr. Hill organized under the laws of New Jersey the Northern Securities Company. The purpose was that the company should become the holder of the stock of the two railroads. This was to be effected by having the Northern Securities Company give its stock in exchange for that of the two railroad companies. Whilst the purpose of the promoters was mainly to exchange the stock held by them in the two railroads for the Northern Securities Company stock, nevertheless the right of stockholders generally in the two railroads to make a similar exchange or to sell their stock to the Securities Company was provided for. Under the arrangement the Northern Securities Company came to be the registered holder of a majority of the stock of both the railroads. It is not denied that the charter, and the acts done under it, of the Northern Securities Company, were authorized by the laws of New Jersey, and, therefore, in so far as those laws were competent to sanction the transaction, the corporation held the stock in the two railroads secured by the law of the State of its domicil.

The government by its bill challenges the right of the Northern Securities Company to hold and own the stock in the two railroads. The grounds upon which the relief sought was based were, generally speaking, as follows: That as the two railroads were competing lines engaged in part in interstate commerce, the creation of the Northern Securities Company and the acquisition by it of a majority of the stock of both roads was contrary to the act of Congress known as the Anti-Trust act. (26 Stat. 209.) The clauses of the act which it was charged were violated were the first section, declaring illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations;" and the provisions of the second section making it a misdemeanor for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations." The court below sustained the contentions of the government. It, there-

fore, enjoined the two railroad companies from allowing the Northern Securities Company to vote the stock standing in its name or to pay to that company any dividends upon the stock by it held. On the giving, however, of a bond fixed by the court below the decree relating to the payment of dividends was suspended pending the appeal to this court.

The court recognized, however, the right of the Northern Securities Company to retransfer the stock in both railroads to the persons from whom it had been acquired. The correctness of the decree below is the question presented for decision.

Two questions arise. Does the Anti-Trust act, when rightly interpreted, apply to the acquisition and ownership by the Northern Securities Company of the stock in the two railroads, and, second, if it does, had Congress the power to regulate or control such acquisition and ownership? As the question of power lies at the root of the case, I come at once to consider that subject. Before doing so, however, in order to avoid being misled by false or irrelevant issues, it is essential to briefly consider two questions of fact. It is said, first, that the mere exchange by the Northern Securities Company of its stock for stock in the railroads did not make the Northern Securities Company the real owner of the stock in the railroads, since the effect of the transaction was to cause the Securities Company to become merely the custodian or trustee of the stock in the railroads; second, that as the two railroads were both over-capitalized, stock in them furnished no sufficient consideration for the issue of the stock of the Northern Securities Company. It would suffice to point out, *a*, that the proof shows that nearly nine million dollars was paid by the Securities Company for a portion of the stock acquired by it, and that, moreover, nearly thirty-five million dollars was expended by the Securities Company in the purchase of bonds of the Northern Pacific Company, which have been converted by the Securities Company into the stock of that railroad, which the Securities Company now holds; and, *b*, that the market value of the railroad stocks is, moreover, indisputably shown by the proof to have been equal to the value fixed on them for the purpose of the exchange or purchase of such stock by the Northern Securities Company. Be this as it may, it is manifest that these considerations can

have no possible influence on the question of the power of Congress in the premises; and therefore the suggestions can serve only to obscure the controversy. If the power was in Congress to legislate on the subject it becomes wholly immaterial what was the nature of the consideration paid by the company for the stock by it acquired and held if such acquisition and ownership, even if real, violated the act of Congress. If on the contrary the authority of Congress could not embrace the right of the Northern Securities Company to acquire and own the stock, the question of what consideration the Northern Securities Company paid for the stock or the method by which it was transferred must necessarily be beyond the scope of the act of Congress.

In testing the power of Congress I shall proceed upon the assumption that the act of Congress forbids the acquisition of a majority of the stock of two competing railroads engaged in part in interstate commerce by a corporation or any combination of persons.

The authority of Congress, it is conceded by all, must rest upon the power delegated by the eighth section of the first article of the Constitution, "to regulate Commerce with foreign Nations, and among the several States and with the Indian tribes." The proposition upon which the case for the government depends then is that the ownership of stock in railroad corporations created by a State is interstate commerce, wherever the railroads engage in interstate commerce.

At the outset, the absolute correctness is admitted of the declaration of Mr. Chief Justice MARSHALL in *Gibbons* v. *Ogden*, that the power of Congress to regulate commerce among the States and with foreign nations " is complete in itself and may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;" and that if the end to be accomplished is within the scope of the Constitution, " all means which are appropriate, which are plainly adapted to that end and which are not prohibited, are constitutional."

The plenary authority of Congress over interstate commerce, its right to regulate it to the fullest extent, to fix the rates to be charged for the movement of interstate commerce, to legislate concerning the ways and vehicles actually engaged in such traffic, and to exert any and every other power over such com-

merce which flows from the authority conferred by the Constitution, is thus conceded. But the concessions thus made do not concern the question in this case, which is not the scope of the power of Congress to regulate commerce, but whether the power extends to regulate the ownership of stock in railroads, which is not commerce at all. The confusion which results from failing to observe this distinction will appear from an accurate analysis of *Gibbons* v. *Ogden*, for in that case the great Chief Justice was careful to define the commerce, the power to regulate which was conferred upon Congress, and in the passages which I have previously quoted, simply pointed out the rule by which it was to be determined in any case whether Congress, in acting upon the subject, had gone beyond the limits of the power to regulate commerce as it was defined in the opinion. Accepting the test announced in *Gibbons* v. *Ogden* for determining whether a given exercise of the power to regulate commerce has in effect transcended the limits of regulation, it is essential to accept also the luminous definition of commerce announced in that case and approved so many times since, and hence to test the question for decision by that definition. The definition is this: "Commerce undoubtedly is traffic, but it is something more, it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, *and is regulated by prescribing rules for carrying on that intercourse.*" (Italics mine.)

Does the delegation of authority to Congress to regulate commerce among the States embrace the power to regulate the ownership of stock in State corporations, because such corporations may be in part engaged in interstate commerce? Certainly not, if such question is to be governed by the definition of commerce just quoted from *Gibbons* v. *Ogden*. Let me analyze the definition. "Commerce undoubtedly is traffic, but it is something more, it is intercourse;" that is, traffic between the States and intercourse between the States. I think the ownership of stock in a State corporation cannot be said to be in any sense traffic between the States or intercourse between them. The definition continues: "It describes the commercial intercourse between nations and parts of nations." Can the ownership of stock in a State corporation, by the most latitudinarian construction, be embraced by the words "commercial intercourse between nations and

parts of nations?" And to remove all doubt, the definition points out the meaning of the delegation of power to regulate, since it says that it is to be "regulated by prescribing rules for carrying on that intercourse." Can it in reason be maintained that to prescribe rules governing the ownership of stock within a State in a corporation created by it is within the power to prescribe rules for the regulation of intercourse between citizens of different States?

But if the question be looked at with reference to the powers of the Federal and State governments, the general nature of the one and the local character of the other, which it was the purpose of the Constitution to create and perpetuate, it seems to me evident that the contention that the authority of the National Government under the commerce clause gives the right to Congress to regulate the ownership of stock in railroads chartered by State authority, is absolutely destructive of the Tenth Amendment to the Constitution, which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." This must follow, since the authority of Congress to regulate on the subject can in reason alone rest upon the proposition that its powers over commerce embraces the right to control the ownership of railroads doing in part an interstate commerce business. But power to control the ownership of all such railroads would necessarily embrace their organization. Hence it would result that it would be in the power of Congress to abrogate every such railroad charter granted by the States from the beginning if Congress deemed that the rights conferred by such State charters tended to restrain commerce between the States or to create a monopoly concerning the same.

Besides, if the principle be acceded to, it must in reason be held to embrace every consolidation of State railroads which may do in part an interstate commerce business, even although such consolidation may have been expressly authorized by the laws of the States creating the corporations.

It would likewise overthrow every State law forbidding such consolidations, for, if the ownership of stock in State corporations be within the regulating power of Congress under the commerce clause and can be prohibited by Congress, it

would be within the power of that body to permit that which it had the right to prohibit.

But the principle that the ownership of property is embraced within the power of Congress to regulate commerce, whenever that body deems that a particular character of ownership, if allowed to continue, may restrain commerce between the States or create a monopoly thereof, is in my opinion in conflict with the most elementary conceptions of rights of property. For it would follow that if Congress deemed that the acquisition by one or more individuals engaged in interstate commerce of more than a certain amount of property would be prejudicial to interstate commerce, the amount of property held or the amount which could be employed in interstate commerce could be regulated.

In the argument at bar many of the consequences above indicated as necessarily resulting from the contention made were frankly admitted, since it was conceded that, even although the holding of the stock in the two railroads by the Northern Securities Company which is here assailed, was expressly authorized by the laws of both the States by which the railroad corporations were created, as it was by the law of the State of New Jersey, nevertheless as such authority, if exerted by the States, would be a regulation of interstate commerce, it would be repugnant to the Constitution as an attempt on the part of the States to interfere with the paramount authority of Congress on that subject. True, this assertion, made in the oral argument, in the printed argument is qualified by an intimation that the rule would not apply to State action taken before the adoption of the Anti-Trust act, since up to that time, in consequence of the inaction of Congress on the subject, the States were free to legislate as they pleased regarding the matter. But this suggestion is without foundation to rest on. It has long since been determined by this court that where a particular subject matter is national in its character and requires uniform regulation, the absence of legislation by Congress on the subject indicates the will of Congress that the subject should be free from State control. (*Mobile County* v. *Kimball*, 102 U. S. 691; *Robins* v. *Shelby Taxing District*, 120 U. S. 489, 493; *United States* v. *E. C. Knight Company*, 156 U. S. 1.)

It is said, moreover, that the decision of this case does

not involve the consequences above pointed out, since the only issue in this case is the right of the Northern Securities Company to acquire and own the stock. The right of that company to do so, it is argued, is one thing; the power of individuals or corporations, when not merely organized to hold stock, an entirely different thing. My mind fails to seize the distinction. The only premise by which the power of Congress can be extended to the subject matter of the right of the Securities Company to own the stock must be the proposition that such ownership is within the legislative power of Congress, and if that proposition be admitted it is not perceived by what process of reasoning the power of Congress over the subject matter of ownership is to be limited to ownership by particular classes of corporations or persons. If the power embraces ownership, then the authority of Congress over all ownership which in its judgment may affect interstate commerce necessarily exists. In other words, the logical result of the asserted distinction amounts to one of two things. Either that nothing is decided or that a decree is to be entered having no foundation upon which to rest. This is said because if the control or the ownership of stock in competing roads by one and the same corporation is within the power of Congress, and creates a restraint of trade or monopoly forbidden by Congress, it is not conceivable to me how exactly similar ownership by one or more individuals would not create the same restraint or monopoly, and be equally within the prohibition which it is decided Congress has imposed. Besides the incongruity of the conclusion, resulting from the alleged distinction to admit it would do violence to both the letter and spirit of the Constitution, since it would in effect hold that, although a particular act was a burden upon interstate commerce or a monopoly thereof, that individuals could lawfully do the act, provided only they did not use the instrumentality of a corporation. But this court long since declared that the power to regulate commerce, conferred upon Congress, was "general and includes alike commerce by individuals, partnerships, associations and corporations." (*Paul* v. *Virginia*, 8 Wall. 168, 183.)

Indeed, the natural reluctance of the mind to follow an erroneous principle to its necessary conclusion, and thus to give effect to a grievous wrong arising from the erroneous

principle, is an admonition that the principle itself is wrong. That admonition, I submit, is conclusively afforded by the decree which is now affirmed. Without stopping to point out what seems to me to be the confusion, contradiction and denial of rights of property which the decree exemplifies, let me see if in effect it is not at war with itself and in conflict with the principle upon which it is assumed to be based.

Fundamentally considered, the evil sought to be remedied is the restraint of interstate commerce and the monopoly thereof, alleged to have been brought about, through the acquisition by Mr. Morgan and Mr. Hill and their friends and associates, of a controlling interest in the stock of both the roads. And yet the decree, whilst forbidding the use of the stock by the Northern Securities Company, authorizes its return to the alleged conspirators, and does not restrain them from exercising the control resulting from the ownership. If the conspiracy and combination existed and was illegal, my mind fails to perceive why it should be left to produce its full force and effect in the hands of the individuals by whom it was charged the conspiracy was entered into.

It may, however, be said that even if the results which I have indicated be held necessarily to arise from the principles contended for by the government, it does not follow that such power would ever be exerted by Congress, or, if exerted, would be enforced to the detriment of charters granted by the States to railroads or consolidations thereof, effected under State authority, or the ownership of stock in such railroads by individuals, or the rights of individuals to acquire property by purchase, lease or otherwise, and to make any and all contracts concerning property which may thereafter become the subject matter of interstate commerce. The first suggestion is at once met by the consideration that it has been decided by this court that, as the Anti-Trust act forbids any restraint, it therefore embraces even reasonable contracts or agreements. If, then, the ownership of the stock of the two railroads by the Northern Securities Company is repugnant to the act it follows that ownership, whether by the individual or another corporation, would be equally within the prohibitions of the act. As to the second, true it is that by the terms of the Anti-Trust act the power to put its provisions in motion is, as

to many particulars, confided to the highest law officer of the government, and if that officer did not invoke the aid of the courts to restrain the rights of the railroads previously chartered by the States to enjoy the benefits conferred upon them by State legislation, or to prevent individuals from exercising their right of ownership and contract, the law in these respects would remain a dead letter. But to indulge in this assumption would be but to say that the law would not be enforced by the highest law officer of the government, a conclusion which, of course, could not be indulged in for a moment. In any view, such suggestion but involves the proposition that vast rights of property, instead of resting upon constitutional and legal sanction, must alone depend upon whether an executive officer might elect to enforce the law—a conclusion repugnant to every principle of liberty and justice.

Having thus by the light of reason sought to show the unsoundness of the proposition that the power of Congress to regulate commerce extends to controlling the acquisition and ownership of stock in State corporations, railroad or otherwise, because they may be doing an interstate commerce business, or to the consolidation of such companies under the sanction of State legislation, or to the right of the citizen to enjoy his freedom of contract and ownership, let me now endeavor to show, by a review of the practices of the governments, both State and National, from the beginning and the adjudications of this court, how wanting in merit is the proposition contended for. It may not be doubted that from the foundation of the government, at all events to the time of the adoption of the Anti-Trust act in 1890, there was an entire absence of any legislation by Congress even suggesting that it was deemed by any one that power was possessed by Congress to control the ownership of stock in railroad or other corporations, because such corporations engaged in interstate commerce. On the contrary, when Congress came to exert its authority to regulate interstate commerce as carried on by railroads, manifested by the adoption of the interstate commerce act, (24 Stat. 379,) it sedulously confined the provisions of that act to the carrying on of interstate commerce itself, including the reasonableness of the rates to be charged for carrying on such commerce and other matters undeniably concern-

ing the fact of interstate commerce. The same conception was manifested subsequently in legislation concerning safety appliances to be used by railroads, since the provisions of the act were confined to such appliances when actually employed in the business of interstate commerce. (27 Stat. 531.) It also may not be doubted that from the beginning the various States of the Union have treated the incorporation and organization of railroad companies and the ownership of stock therein as matters within their exclusive authority. Under this conception of power in the States, universally prevailing and always acted upon, the entire railroad system of the United States has been built up. Charters, leases and consolidations under the sanction of State laws lie at the basis of that enormous sum of property and those vast interests represented by the railroads of the United States. Extracts from the reports of the Interstate Commerce Commission and from a standard authority on the subject, which were received in evidence, demonstrate that in effect nearly every great railroad system in the United States is the result of the consolidation and unification of various roads, often competitive, such consolidation or unification of management having been brought about in every conceivable form, sometimes by lease under State authority, sometimes by such leases made where there was no prohibition against them, and by stock acquisitions made by persons or corporations in order to acquire a controlling interest in both roads. Without stopping to recite details on the subject, I content myself with merely mentioning a few of the instances where great systems of railroad have been formed by the unification of the management of competitive roads, by consolidation or otherwise, often by statutory authority. These instances embrace the Boston and Maine system, the New York, New Haven and Hartford, the New York Central, the Reading, and the Pennsylvania systems. One of the illustrations—as to the New York Central system—is the case of the Hudson River Railroad on one side of the Hudson River and the West Shore Railroad on the other, both parallel roads and directly competitive, and both united in one management by authority of a legislative act. It is indeed remarkable, if the whole subject was within the paramount power of Congress and not within the authority of the States, that there should have been

a universal understanding to the contrary from the beginning. When it is borne in mind that such universal action related to interests of the most vital character, involving property of enormous amount concerning the welfare of the whole people, it is impossible in reason to deny the soundness of the assumption that it was the universal conviction that the States, and not Congress, had control of the subject matter of the organization and ownership of railroads created by the States. And the same inference is applicable to the condition of things which has existed since the adoption of the Anti-Trust act in 1890. Who can deny that from that date to this consolidation and unification of management, by means of leases, stock ownership by individuals or corporations, have been carried on, when not prohibited by State laws, to a vast extent, and that during all this time, despite the energy of the government in invoking the Anti-Trust law, that no assertion of power in Congress under that act to control the ownership of stock was ever knowingly made until first asserted in this cause. Quite recently Congress has amended the interstate commerce act by provisions deemed essential to make its prohibitions more practically operative, and yet no one of such provisions lend themselves even to the inference that it was deemed by any one that the power of Congress extended to the control of stock ownership. Certainly the States have not so considered it. As a matter of public history it is to be observed that not long since, by authority of the legislature of the State of Massachusetts, a controlling interest by lease of the Boston and Albany road passed to the New York Central system.

The decisions of this court to my mind leave no room for doubt on the subject. As I have already shown, the very definition of the power to regulate commerce, as announced in *Gibbons* v. *Ogden*, excludes the conception that it extends to stock ownership. I shall not stop to review a multitude of decisions of this court concerning interstate commerce, which, whilst upholding the paramount authority of Congress over that subject, at the same time treated it as elementary, that the effect of the power over commerce between the States was not to deprive the States of their right to legislate concerning the ownership of property of every character or to create railroad corporations and to en-

dow them with such powers as were deemed appropriate or to deprive the individual of his freedom to acquire, own and enjoy property by descent, contract or otherwise, because railroads or other property might become the subject of interstate commerce.

In *Paul* v. *Virginia*, (8 Wall. 168,) the question was as to the power of the State of Virginia to license a foreign insurance company, and one of the contentions considered was whether the contract of insurance, since it was related to commerce, was within the regulating power of Congress and not of the State of Virginia. The proposition was disposed of in the following language (p. 183) :

"Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York, whilst in Virginia would constitute a portion of such commerce."

In other words, the court plainly pointed out the distinction between interstate commerce as such and the contracts concerning, or the ownership of property which might become the subjects of interstate commerce. And the authority of *Paul* v. *Virginia* has been repeatedly approved in subsequent cases, which are so familiar as not to require citation.

In *Railroad Co.* v. *Maryland*, (21 Wall. 456,) the question was this : The State of Maryland had chartered the Baltimore and Ohio Railroad Company, and in the charter had imposed upon it the duty of paying to the State a certain proportion of

all its receipts from freight, which applied as well to interstate as domestic freight. The argument was that these provisions were repugnant to the commerce clause, because they necessarily increased the sum which the railroad would have to charge, and thereby constituted a regulation of commerce. The court held the law not to be repugnant to the Constitution, and in the course of the opinion said (p. 473):

"In view, however, of the very plenary powers which a State has always been conceded to have over its own territory, its highways, its franchises and its corporations, we cannot regard the stipulation in question as amounting to either of these unconstitutional acts."

True it is that some of the expressions used in the opinion in the case just cited, giving rise to the inference that there was power in the State to regulate the rates of freight on interstate commerce, may be considered as having been overruled by *Wabash Railroad Company* v. *Illinois*, (118 U. S. 557.) But that case also in the fullest manner pointed out the fact that the power to regulate commerce, conferred on Congress by the Constitution, related not to the mere ownership of property or to contracts concerning property, because such property might subsequently be used in interstate commerce or become the subject of it. For instance, the definition given of interstate commerce in *Gibbons* v. *Ogden*, previously referred to, was reiterated and in addition the definition expounded in *County of Mobile* v. *Kimball*, (102 U. S. 691,) was approvingly quoted. That definition was as follows (p. 574):

"Commerce with foreign countries and among the States, strictly construed, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by the separate States is not therefore permissible. Language affirming the exclusiveness of the grant of power over commerce *as thus defined* may not be inaccurate, when it would be so *when applied to legislation upon subjects which are merely auxiliary to commerce.*"

In *Ashley* v. *Ryan*, (153 U. S. 436,) this was the question: The property of various railroad corporations operating in the

State of Ohio, Michigan, Indiana, Illinois and Missouri had been sold under decrees of foreclosure. The purchasers of the respective lines availed themselves of the Ohio statutes, and consolidated all the corporations into one so as to form a single system, the Wabash. On presenting the articles of consolidation to the Secretary of State of Ohio, that officer demanded a fee imposed by the Ohio statutes, predicated upon the sum total of the capital stock of the consolidated company. This was refused on the ground that the State of Ohio had no right to make the charge, and that its doing so was repugnant to the commerce clause of the Constitution of the United States and to the Fourteenth Amendment. This court decided against this contention. It held that, as the right to consolidate could alone arise from the Ohio law, the corporation could not avail of that law and avoid the condition which the law imposed. Speaking of the consolidation, the court said (p. 440):

"The rights thus sought could only be acquired by the grant of the State of Ohio, and depended for existence upon the provisions of its laws. Without that State's consent they could not have been procured."

And, after a copious review of the authorities concerning the power of the State over the consolidation, the case was summed up by the court in the following passage (p. 446):

"Considering, as we do, that the payment of the charge was a condition imposed by the State of Ohio upon the taking of corporate being or the exercise of corporate franchises, *the right to which depended solely on the will of that State*," (italics mine,) "and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and that its enforcement involved no attempt on the part of the State to extend its taxing power beyond its territorial limits."

How a right which was thus decided to depend *solely* upon the authority of the States can now be said to depend solely upon the will of Congress, I do not perceive.

In *United States* v. *E. C. Knight Co.*, (156 U. S. 1), the facts and the relief based on them were thus stated by Mr. Chief Justice FULLER, delivering the opinion of the court (p. 9):

"By the purchase of the stock of the four Philadelphia refineries, with shares of its own stock, the American Sugar

Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into them the defendants combined and conspired to restrain trade and commerce in refined sugar among the several States and with foreign nations, contrary to the act of Congress of July 2, 1890."

After referring, in a general way, to what constituted a monopoly or restraint of trade at common law, the question for decision was thus stated (p. 11):

"The fundamental question is, whether conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill."

Examining this question as to the power of Congress, it was observed (p. 11):

"It cannot be denied that the power of a State to protect the lives, health and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive."

Next, pointing out that the power of Congress over interstate commerce and the fact that its failure to legislate over subjects requiring uniform legislation expressed the will of Congress that the State should be without power to act on that subject, the court came to consider whether the power of Congress to regulate commerce embraced the authority to regulate and control the ownership of stock in the State sugar refining companies, because the products of such companies when manufactured might become the subject of interstate commerce. Elaborately passing upon that question and reaffirming the definition of Chief Justice MARSHALL of commerce, in the constitutional sense, it was held that, whilst the power of Congress extended to commerce as thus defined, it did not embrace the ownership of stock in State corporations, because the products of such manufacture might subsequently become the subjects of interstate commerce.

The parallel between the two cases is complete. The one corporation acquired the stock of other and competing corporations by exchange for its own. It was conceded, for the purposes of the case, that in doing so monopoly had been brought about in the refining of sugar, that the sugar to be produced was likely to become the subject of interstate commerce, and indeed that part of it would certainly become so. But the power of Congress was decided not to extend to the subject, because the ownership of the stock in the corporations was not itself commerce.

In *Pearsall* v. *The Great Northern Railway Company*, (161 U. S. 646,) the question was whether the acquisition by the Great Northern road of a controlling interest in the stock of the Northern Pacific Railway Company was a violation of a Minnesota statute prohibiting the consolidation of competing lines. It is at once evident that if the subject of consolidation was within the authority of Congress, as Congress had not expressed its will upon the subject, the act of the legislature of Minnesota was void because repugnant to the Constitution of the United States. But the possibility of such a contention was not thought of by either party to the cause or by the court itself. Treating the power of the State as undoubted, the court, speaking through Mr. Justice BROWN, decided that the Minnesota law should be enforced. It was pointed out in the opinion that, as the charter was one granted by the State, the railroad company and the ownership of stock therein was subject to the State law, and this was made the basis of the decision. Whilst, however, resting its conclusion upon the power of the State over the corporation by it created, the court was careful to recognize that the authority in the State was so complete, as the company was a State corporation, that the State had the right, *if it chose to do so, to authorize the consolidation, even although the lines were competing.*

In *Louisville & Nashville Railroad* v. *Kentucky*, (161 U. S. 677,) the power of the State to pass a law forbidding the consolidation of competing State railroad corporations doing in part an interstate commerce business was again considered, and a State statute in which the power was exercised was upheld. Here, again, it is to be observed that if the consolidation of State railroad corporations, because they did in part an interstate commerce business, was within the

paramount authority of Congress, that authority was exclusive and the State regulation which the court upheld was void. And this question, vital to the consideration of the case, and without passing upon which it could not have been decided did not escape observation, since it was explicitly pressed upon the court and was directly determined. The court, speaking through Mr. Justice BROWN, said (pp. 701, 702):

"But little need be said in answer to the final contention of the plaintiff in error, that the assumption of a right to forbid the consolidation of parallel and competing lines is an interference with the power of Congress over interstate commerce. The same remark may be made with respect to all police regulations of interstate railways.

* * * * * *

"It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under State authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce, and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests."

How one case could be more completely decisive of another than the ruling in the case just quoted is of this, I am unable to perceive.

The subject was considered at circuit in *In re Greene*, (52 Fed. Rep. 105.) The case was this: A person was indicted in one State for creating a monopoly in violation of the Anti-Trust act of Congress and was held in another State for extradition. The writ of *habeas corpus* was invoked, upon the contention that the face of the indictment did not state an offense against the United States, since the matters charged did not involve interstate commerce. The case is referred to, although it arose at circuit and was determined before the decisions of this court in the Pearsall and Louisville and Nashville cases, be-

cause it was decided by Mr. Justice JACKSON, then a Circuit Judge, who subsequently, became a member of this court. The opinion manifests that the case was considered by Judge JACKSON with that care which was his conceded characteristic and was stated by him with that lucidity which was his wont. In discharging the accused on the grounds stated in the application for the writ Judge JACKSON said (p. 112) :

" Congress may place restrictions and limitations upon the right of corporations created and organized under its authority to acquire, use and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. But Congress certainly has not the power or authority under the commerce clause, or any other provision of the Constitution, to limit and restrict the right of corporations created by the States, or the citizens of the States, in the acquisition, control and disposition of property. Neither can Congress regulate or prescribe the price or prices at which such property, or products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that Congress has no jurisdiction over, and cannot make criminal, the aims, purposes and intentions of persons in the acquisition and control of property, which the States of their residence or creation sanction and permit. It is not material that such property, or the products thereof, may become the subject of trade or commerce among the several States or with foreign nations. Commerce among the States, within the exclusive regulating power of Congress, ' consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities.' (*County of Mobile* v. *Kimball*, 102 U. S. 691–702; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. Rep. 826.) In the application of this comprehensive definition, it is settled by the decision of the Supreme Court that such commerce includes, not only the actual transportation of commodities and persons between the States, but also the instrumentalities and processes of such transportation.

* * * * * *

" That neither the production nor manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other States, nor the preparation for their transportation from the State where produced or manufactured, prior to the commencement of the actual transfer, or transmission thereof to another State, constitutes that interstate commerce which comes within the regulating power of Congress; and, further, that after the termination of the transportation of commodities

or articles of traffic from one State to another, and the mingling or merging thereof in the general mass of property in the State of destination, the sale, distribution and consumption thereof in the latter State forms no part of interstate commerce."

If this opinion had been written in the case now considered it could not more completely than its reasoning does have disposed of the contention that the ownership of stock by a corporation in competing railroads was commerce.

United States v. *Freight Association*, (166 U. S. 290,) was this: A large number of railway companies, who were made defendants in the cause, had formed themselves into an association, known as the Trans-Missouri Freight Association, and the companies had bound themselves by the provisions contained in the articles of agreement. Many stipulations relating to the carrying of interstate commerce over the roads which were parties to the agreement were contained in it, and section 3 provided as follows:

"A committee shall be appointed to establish rates, rules and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order, but if they differ the question at issue shall be referred to the managers of the lines parties thereto, and if they disagree it shall be arbitrated in the manner provided in article VII."

The government sought to dissolve the association on the ground that the agreement restrained commerce between the States, and therefore was in violation of the Anti-Trust act. On the hearing in this court, as the agreement directly related in many particulars to interstate transportation and the charge, to be made therefor, it was conceded on all hands that it embraced subjects which came within the power of Congress to regulate commerce. The contentions on behalf of the association were these: First. That the movement of interstate commerce by railroads was not within the Anti-Trust act, since Congress had regulated that subject by the interstate commerce act, and did not intend to amplify its provisions in any respect by the subsequent enactment of the Anti-Trust law. Second. That even if this were not the case, and the movement of interstate commerce by railroads was affected by the Anti-

Trust statute, the particular agreement in question did not violate the act, because the agreement did not unreasonably restrain interstate commerce. Both these contentions were decided against the association, the court holding that the Anti-Trust act did embrace interstate carriage by railroad corporations, and as that act prohibited any contract in restraint of interstate commerce, it hence embraced all contracts of that character, whether they were reasonable or unreasonable.

The same subject was considered in a subsequent case, *United States* v. *Joint Traffic Association*, (171 U. S. 505.) In that case also there was no question that the agreement between the railroads related to the movement of interstate commerce, but it was insisted that the particular agreement there involved did not seek to fix rates, but only to secure the continuation of just rates which had already been fixed, and hence was not within the Anti-Trust law. If this were held not to be true, a reconsideration of the questions decided in the Freight Association case was invoked. The court reviewed and reiterated the rulings made in the Freight Association case and held that the particular agreement in question came within them.

I mention these two last cases not because they are apposite to the case in hand, for they are not, since the contracts which were involved in them confessedly concerned interstate commerce, whilst in this case the sole question is whether the ownership of stock in competing railroads does involve interstate commerce. The cases are referred to in connection with the decisions previously cited, because, taken together, they illustrate the distinction which this court has always maintained between the power of Congress over interstate commerce and its want of authority to regulate subjects not embraced within that grant. The same distinction is aptly shown in subsequent cases.

Hopkins v. *United States*, (171 U. S. 578,) involved whether a particular agreement entered into between persons carrying on the business of selling cattle on commission, exclusively at the Kansas City stock yards. At those yards cattle were received in vast numbers through the channels of interstate commerce, and from thence were distributed through such channels. For these reasons the business of those engaged

exclusively in the sale of cattle on the stock yards was asserted to be interstate commerce and within the power of Congress to regulate. In the opinion of the court, delivered by Mr. Justice PECKHAM, it was at the outset said (p. 586):

"The relief sought in this case is based exclusively on the act of Congress approved July 2, 1890, c. 647, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' commonly spoken of as the Anti-Trust act. (26 Stat. 209.)

"The act has reference only to that trade or commerce which exists, or may exist, among the several States or with foreign nations, and has no application whatever to any other trade or commerce.

"The question meeting us at the threshold, therefore, in this case is, what is the nature of the business of the defendants, and are the by-laws, or any subdivision of them above referred to, in their direct effect in restraint of trade or commerce among the several States or with foreign nations; or does the case made by the bill and answer show that any one of the above defendants has monopolized, or attempted to monopolize, or combined or conspired with other persons to monopolize, any part of the trade or commerce among the several States or with foreign nations?"

Proceeding, then, to consider the agreement, it was pointed out that the contention that the sale of cattle on the stock yards constituted interstate commerce was without merit. The distinction between interstate commerce as such and the power to make contracts and to buy and sell property was clearly stated, and because of that distinction the agreement was held not to be within the act of Congress, because that act could and did only relate to interstate commerce.

And on the day the decision just referred to was announced another case under the Anti-Trust act was decided. (*Anderson* v. *United States*, 171 U. S. 604.) The difference between that case and the Hopkins case was thus stated by Mr. Justice PECKHAM, in delivering the opinion of the court (p. 612):

"This case differs from that of *Hopkins* v. *United States*, *supra*, in the fact that these defendants are themselves purchasers of cattle on the market, while the defendants in the Hopkins case were only commission merchants who sold the cattle upon commission as a compensation for their services.

"Counsel for the government assert that any agreement or combination among buyers of cattle coming from other States,

of the nature of the by-laws in question, is an agreement or combination in restraint of interstate trade or commerce."

The court, however, said it did not deem it necessary to decide whether the fact that the merchants who entered into the agreement bought cattle in other States and shipped them to other States, caused their business to be interstate commerce, because in any event the court was of opinion that the agreement which was assailed, even if it involved interstate commerce, was in violation of any of the provisions of the Anti-Trust act.

The Anderson case was followed by *Addyston Pipe & Steel Co.* v. *United States*, (175 U. S. 211.) The case involved deciding whether a particular combination of pipe manufacturers, looking to the control of the sale and transportation of such pipe over a large territory, embracing many States and a division of the territory between the members of the combination, was within the prohibitions of the Anti-Trust act. Coming to consider the subject, the court, through Mr. Justice PECKHAM, analyzed the contract and pointed out its monopolistic features. In answer to the argument that the matter complained of was not commerce, because it related only to a sale of pipe, and therefore was within the rule announced in the Knight and Hopkins cases, the Knight case was approvingly reviewed, and its doctrine in effect was reaffirmed, the court observing (p. 240) :

" The direct purpose of the combination in the Knight case was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article; nothing looking to a transaction in the nature of interstate commerce.

* * * * * * * *

" We think the case now before us involves contracts of the nature last before mentioned, not incidentally or collaterally, but as a direct and immediate result of the combination engaged in by defendants. . . . *The defendants by reason of this combination and agreement could only send their goods out of the State in which they were manufactured for sale and delivery in another State, upon the terms and pursuant to the provisions of such combination.* As pertinently asked by the court below, was not this a direct restraint upon interstate commerce in those goods ? " (Italics mine.)

Having thus found that the agreement concerned interstate commerce, because it directly purported to control the movement of goods from one State to the other, and besides sought to prohibit that movement or restrict the same to particular individuals, it was held that the contract was, for these reasons, within the prohibitions of the act of Congress, and was therefore void. I do not pause to consider the case of *Montague* v. *Lowry*, decided at this term, since on the face of the opinion it is patent that the contract directly concerned the shipment of goods from one State to another, and this was the sole and exclusive basis of the decision.

Now, it is submitted, that the decided cases just reviewed demonstrate that the acquisition and ownership of stock in competing railroads, organized under State law, by several persons or by corporations, is not interstate commerce, and, therefore, not subject to the control of Congress. It is, indeed, suggested that the cases establish a contrary doctrine. This is sought to be demonstrated by quoting passages from the opinions separated from their context apart from the questions which the cases involved. But as the issues which were decided in the Knight, in the Pearsall, in the Louisville and Nashville case and in the Hopkins case directly exclude the significance attributed to the passages from the opinions in those cases relied upon, it must follow that if such passages could, when separated from their context, have the meaning attributed to them the expressions would be mere *obiter*. And this consideration renders it unnecessary for me to analyze the passages to show that when they are read in connection with their context they have not the meaning now sought to be attached to them. But other considerations equally render it unnecessary to particularly review the sentences relied upon. There can be no doubt that it was expressly decided in the Knight case that the acquisition of stock by one corporation in other corporations so as to control them all was not interstate commerce, *although the goods of the manufacturing companies whose stock was acquired might become the subject of interstate commerce.* If then the passage from the Knight case could be given the meaning sought to be affixed to it, the result would be but to say that that case overruled itself. And this would be the result in the Pearsall case, since in that case it was decided that the States had the power to

forbid the consolidation of competing railroads, even by means of the acquisition of stock. Besides, as in the Louisville and Nashville case, immediately following the Pearsall, it was expressly decided that the interstate commerce power of Congress did not embrace such consolidation, and Congress, therefore, could not restrain a State from either forbidding or permitting it to take place, it would follow that if the sentences in the Pearsall case had the import now applied to them, that that case not only overruled itself, but was besides overruled by the Louisville and Nashville case, and this although the two cases were decided on the same day, the opinions in both cases having been delivered by the same Justice.

The same confusion and contradiction arises from separating from their context and citing as applicable to this case passages from the opinions in the Freight Association and Joint Traffic cases. Those cases, as I have previously stated, related exclusively to a contract admittedly involving interstate commerce, and it was decided that any restraint of such commerce was forbidden by the Anti-Trust act. Now in the Hopkins case, decided subsequent to the Freight Association and Joint Traffic cases, the contract considered unquestionably involved a restraint, but, as such restraint did not concern interstate commerce, it was held not to come within the power of Congress. It would follow then, if the sentences quoted from the opinions in the Freight Association and Joint Traffic cases, which cases concerned only that which was completely interstate commerce, applied to that which was not such commerce, that the Hopkins case overruled both these cases, although the opinions in all of the cases were delivered by the same Justice, and no intimation was suggested of such overruling. It would also result that, after having overruled those cases in the Hopkins case, the court, in expressing its opinion through the same Justice, proceeded in the Addyston Pipe case, which related only to interstate commerce, to overrule the Hopkins case and reaffirm the prior cases.

Of course, in my opinion, there is no ground for holding that the decided cases embody such extreme contradictions or produce such utter confusion. The cases are all consistent, if only the elementary distinction upon which they proceeded be not obscured, that is, the difference which arises from the

power of Congress to regulate interstate commerce on the one hand, and its want of authority on the other, to regulate that which is not interstate commerce. Indeed, the confounding and treating as one, things which are wholly different, is the error permeating all the contentions for the government.

What has been previously said suffices to show the reasons which control my judgment, and I might well say nothing more. There were, however, three propositions so earnestly pressed by the government at bar upon the theory that they demonstrate that common ownership of a majority of the stock of competing railroads is subject to the regulating power of Congress that I propose to briefly give the reasons which cause me to conclude that the contentions relied upon are without merit.

1. This court, it is urged, has frequently declared that the power of Congress over interstate commerce includes the authority to regulate the instrumentalities of such commerce, and the following cases are cited: *Railroad Co.* v. *Fuller*, (17 Wall. 560;) *Welton* v. *Missouri*, (91 U. S. 275;) *Pensacola Telephone Co.* v. *Western Union Telegraph Co.*, (96 U. S. 1;) *Gloucester Ferry Co.* v. *Pennsylvania*, (114 U. S. 196.) To these cases might be added many others, including some of those which have been previously referred to by me. The argument now made is, as the power extends to instrumentalities, and railroads are such instrumentalities, therefore the acquisition and ownership of railroads, by persons or corporations, is commerce and subject to the power of Congress to regulate. But this involves a *non sequitur*, and a confusion of thought arising from again confounding as one, things which are wholly different. True, the instrumentalities of interstate commerce are subject to the power to regulate commerce, and therefore such instrumentalities when employed in interstate commerce may be regulated by Congress as to their use in such commerce. But this is entirely distinct from the power to regulate the acquisition and ownership of such instrumentalities, and the many forms of contracts from which such ownership may arise. The same distinction exists between the two which obtains between the power of Congress to regulate the movement of property in the channels of interstate commerce and its want of authority to regulate the acquisition and

ownership of the same property. This difference was pointed out in the cases which have been referred to, and the distinction between the two has been from the beginning the dividing line, demarking the power of the national government on the one hand and of the States on the other. All the rights of ownership in railroads belonging to corporations organized under State law, the power to acquire the same, to mortgage, to foreclose mortgages, to lease, and the contract relations concerning them, have from the foundation had their sanction in the legislation of the several States. One may search in vain in the acts of Congress for any legislation even suggesting that the power over these subjects was deemed to be in Congress. On the contrary, the legislation of Congress concerning the instrumentalities of railroads under the interstate commerce power clearly refutes the contention, since that legislation relates only to such instrumentalities during their actual use in interstate commerce and not otherwise. How, consistently with the proposition, can the great number of cases be explained which in both the Federal and State courts have dealt with the ownership of railroads and their instrumentalities by foreclosure and otherwise, under the assumption that the rights of the parties were controlled by State laws governing the subject? And here again it would follow, if the proposition was adopted, that all the vast body of State legislation on the subject would be void from the beginning and the enormous sum of property rights depending upon such legislation would be impaired and lost, since if the subject were within the power of Congress it was one requiring a uniform regulation, and therefore the inaction of Congress would signify an entire want of power in the States over the subject.

2. The court, it is urged, has in a number of cases declared that the several States were without power to directly burden interstate commerce. The acquiring and ownership by one person or corporation of a majority of the stock in competing railroads engaged in interstate commerce, it is argued, being a direct burden, therefore power to regulate the subject is in Congress and not in the States. Undoubtedly not only in the decisions referred to but in many others, including most of those which have been by me quoted, the absolute want of power in the States to legislate concerning interstate

commerce or to burden it directly has been declared, and the doctrine in its fullest scope is too elementary to require citation of authority. But to decide this case upon the assumption that the acquisition and ownership of stock in competing railroads engaged in interstate commerce is a regulation of commerce, or, what is the same thing, a direct burden on it, would be but to assume the question arising for decision.

Where an authority is exerted by a State which is within its power, and that authority as exercised does not touch interstate commerce or its instrumentalities and can only have an effect upon such commerce by reason of the reflex and remote results of the exertion of the lawful power, it cannot be said, without contradiction in terms, that the power exercised is a regulation, because a direct burden to commerce. *To say to the contrary would be to declare that no power on any subject, however local in its character, could be exercised by the States if it was deemed by Congress or the courts that there would be produced some effect upon interstate commerce.* The question whether a burden is direct and therefore constitutes a regulation of interstate commerce is to be determined by ascertaining whether the power exerted is lawful, generally speaking, and then by finding whether its exercise in the particular case was such as to cause it to be illegal, because directly burdening interstate commerce. If in a given case the power be lawful and the mode in which it is exercised be not such as to directly burden, there is no regulation of commerce, although as an indirect result of the exertion of the lawful power some effect may be produced upon commerce. In other words, where the power is lawful but it is asserted that it has been so exerted as to amount to a direct burden, *there must be, so to speak, a privity between the manifestation of the power and the resulting burden.* The distinction is well illustrated by the cases which have been referred to, and was very lucidly pointed out by Judge JACKSON in the Greene case. Take the Knight case. There as the contract merely concerned the purchase of stock in the refineries, and contained no condition relating to the movement in interstate commerce of the goods to be manufactured by the refining companies, the court held as the right to acquire was not within the commerce clause, the fact that the owners of the manufactured product might

thereafter so act concerning the product as to burden commerce, there was no direct burden resulting from the mere acquisition and ownership. On the contrary, in the Addyston Pipe case, after stating in the fullest way the paramount authority of Congress concerning commerce, the court approached the terms of the contract in order to determine whether it related to interstate commerce, and if it did, whether it created a direct burden. In doing so, as it found that the contract both related to interstate commerce and directly burdened the same, the contract was held to be void. This case comes within the Knight case. It concerns the acquisition and ownership of stock. No contract is in question made by the owners of the stock controlling the railroads in the performance of their duties as carriers of interstate commerce. The sole contention is that as the result of the ownership of the stock there may arise, in the operation of the roads, a burden on interstate commerce. That is, that such burden may indirectly result from the acquisition and ownership. To maintain the contention, therefore, it must be decided that because ownership of property if acquired may be so used as to burden commerce, therefore to acquire and own is to burden. This, however, would be but to declare that that which was in its very nature and essence indirect is direct.

3. But, it is said, it may not be denied that the common ownership of stock in competing railroads endows the holders of the majority of the stock with a common interest in both railroads and with the authority, if they choose to exert it, to so unify the management of the roads as to suppress competition between them. This power, it is insisted, is within the regulating authority of Congress over interstate commerce. In other words, the contention broadly is that Congress has not only the authority to regulate the exercise of interstate commerce, but under that power has the right to regulate the ownership and possession of property, if the enjoyment of such rights would enable those who possessed them if they engaged in interstate commerce to exert a power over the same. But this proposition only asserts in another form that the right to acquire the stock was interstate commerce, and therefore was within the authority of Congress, and is refuted by the reasons and authorities already advanced. That the proposition, if adopted, would extend the

power of Congress to all subjects essentially local, as already stated in considering the previous proposition, is to my mind manifest. So clearly is this the result of the particular proposition now being considered, that, at the risk of repetition, I again illustrate the subject. Under this doctrine the sum of property to be acquired by individuals or by corporations, the contracts which they may make, would be within the regulating power of Congress. If it were judged by Congress that the farmer in sowing his crops should be limited to a certain production because overproduction would give power to affect commerce, Congress could regulate that subject. If the acquisition of a large amount of property by an individual was deemed by Congress to confer upon him the power to affect interstate commerce if he engaged in it, Congress could regulate that subject. If the wage-earner organized to better his condition and Congress believed that the existence of such organization would give power, if it were exerted, to affect interstate commerce, Congress could forbid the organization of all labor associations. Indeed, the doctrine must in reason lead to a concession of the right in Congress to regulate concerning the aptitude, the character and capacity of persons. If individuals were deemed by Congress to be possessed of such ability that participation in the management of two great competing railroad enterprises would endow them with the power to injuriously affect interstate commerce, Congress could forbid such participation. If the principle were adopted, and the power which would arise from so doing were exercised, the result would be not only to destroy the State and Federal governments, but by the implication of authority, from which the destruction would be brought about, there would be erected upon the ruins of both a government endowed with the arbitrary power to disregard the great guaranty of life, liberty and property and every other safeguard upon which organized civil society depends. I say the guaranty, because in my opinion the three are indissolubly united, and one cannot be destroyed without the other. Of course, to push propositions to the extreme to which they naturally lead is often an unsafe guide. But at the same time the conviction cannot be escaped by me that principles and conduct bear a relation one to the other, especially in matters of public concern. The fathers founded our government upon an enduring

basis of right, principle and of limitation of power. Destroy the principles and the limitations which they impose, and I am unable to say that conduct may not, when unrestrained, give rise to action doing violence to the great truths which the destroyed principles embodied.

The fallacy of all the contentions of the government is, to my mind, illustrated by the summing up of the case for the government made in the argument at bar. The right to acquire and own the stock of competing railroads involves, says that summing up, the power of an individual "*to do*" (italics mine) absolutely as he pleases with his own, whilst the claim of the government is that the right of the owner of property "*to do*" (italics mine) as he pleases with his own may be controlled in the public interest by legitimate legislation. But the case involves the right to *acquire and own*, not the right "*to do*" (italics mine). Confusing the two gives rise to the errors which it has been my endeavor to point out. Undoubtedly the States possess power over corporations, created by them, to permit or forbid consolidation, whether accomplished by stock ownership or otherwise, to forbid one corporation from holding stock in another, and to impose on this or other subjects such regulations as may be deemed best. Generally speaking, however, the right to do these things springs alone from the fact that the corporation is created by the States, and holds its rights subject to the conditions attached to the grant, or to such regulations as the creator, the State, may lawfully impose upon its creature, the corporation. Moreover, irrespective of the relation of creator and creature, it is, of course, true in a general sense that government possesses the authority to regulate, within certain just limits, what an owner *may do* with his property. But the first power which arises from the authority of a grantor to exact conditions in making a grant or to regulate the conduct of the grantee gives no sanction to the proposition that a government, irrespective of its power to grant, has the general authority to limit the character and quantity of property which may be acquired and owned. And the second power, the general governmental one, to reasonably control the *use* of property, affords no foundation for the proposition that there exists in government a power to limit the quantity

and character of property which may be acquired and owned. The difference between the two is that which exists between a free and constitutional government restrained by law and an absolute government unrestrained by any of the principles which are necessary for the perpetuation of society and the protection of life, liberty and property.

It cannot be denied that the sum of all just governmental power was enjoyed by the States and the people before the Constitution of the United States was formed. None of that power was abridged by that instrument except as restrained by constitutional safeguards, and hence none was lost by the adoption of the Constitution. The Constitution, whilst distributing the pre-existing authority, preserved it all. With the full power of the States over corporations created by them and with their authority in respect to local legislation, and with power in Congress over interstate commerce carried to its fullest degree, I cannot conceive that if these powers, admittedly possessed by both, be fully exerted a remedy cannot be provided fully adequate to suppress evils which may arise from combinations deemed to be injurious. This must be true unless it be concluded that by the effect of the mere distribution of power made by the Constitution partial impotency of governmental authority has resulted. But if this be conceded, *arguendo*, the Constitution itself has pointed out the method by which, if changes are needed, they may be brought about. No remedy, in my opinion, for any supposed or real infirmity can be afforded by disregarding the Constitution, by destroying the lines which separate State and Federal authority, and by implying the existence of a power which is repugnant to all those fundamental rights of life, liberty and property, upon which just government must rest.

If, however, the question of the power of Congress be conceded, and the assumption as to the meaning of the Anti-Trust act which has been indulged in for the purpose of considering that power be put out of view, it would yet remain to be determined whether the Anti-Trust act embraced the acquisition and ownership of the stock in question by the Northern Securities Company. It is unnecessary for me, however, to state the reasons which have led me to the conclusion that the act, when properly interpreted, does not embrace the acquisition and ownership of such stock, since that subject is considered in an

opinion of Mr. Justice HOLMES, which explains the true interpretation of the statute, as it is understood by me, more clearly than I would be able to do.

Being of the opinion, for the reasons heretofore given, that Congress was without power to regulate the acquisition and ownership of the stock in question by the Northern Securities Company, and because I think even if there were such power in Congress, it has not been exercised by the Anti-Trust act, as is shown in the opinion of Mr. Justice HOLMES, I dissent.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice PECKHAM and Mr. Justice HOLMES concur in this dissent.

SUPREME COURT OF THE UNITED STATES.

No. 277.—October Term, 1903.

Northern Securities Company et al., Appellants, vs. The United States.	Appeal from the Circuit Court of the United States for the District of Minnesota.

[March 14, 1904.]

Mr. Justice Holmes, with whom concurred the Chief Justice, Mr. Justice White, and Mr. Justice Peckham, dissenting:

I am unable to agree with the judgment of the majority of the Court, and although I think it useless and undesirable, as a rule, to express dissent, I feel bound to do so in this case and to give my reasons for it.

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words. We must try, I have tried, to do it with the same freedom of natural and spontaneous interpretation that one would be sure of if the same question arose upon an indictment for a similar act which excited no public attention, and was of importance only to a prisoner before the court. Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, yet when their task is to interpret and apply the words of a statute, their function is merely academic to begin

with—to read English intelligently—and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt.

The question to be decided is whether, under the act of July 2, 1890, c. 647, (26 Stat. 209,) it is unlawful, at any stage of the process, if several men unite to form a corporation for the purpose of buying more than half the stock of each of two competing interstate railroad companies, if they form the corporation, and the corporation buys the stock. I will suppose further that every step is taken, from the beginning, with the single intent of ending competition between the companies. I make this addition not because it may not be and is not disputed but because, as I shall try to show, it is totally unimportant under any part of the statute with which we have to deal.

The statute of which we have to find the meaning is a criminal statute. The two sections on which the government relies both make certain acts crimes. That is their immediate purpose and that is what they say. It is vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted in this case must be adopted in one of the other sort. I am no friend of artificial interpretations because a statute is of one kind rather than another, but all agree that before a statute is to be taken to punish that which always has been lawful it must express its intent in clear words. So I say we must read the words before us as if the question were whether two small exporting grocers should go to jail.

Again the statute is of a very sweeping and general character. It hits "every" contract or combination of the prohibited sort, great or small, and "every" person who shall monopolize or attempt to monopolize, in the sense of the act, "any part" of the trade or commerce among the several States. There is a natural inclination to assume that it was directed against certain great combinations and to read it in that light. It does not say so. On the contrary, it says "every," and "any part." Still less was it directed specially against railroads. There even was a reasonable doubt whether

it included railroads until the point was decided by this Court.

Finally, the statute must be construed in such a way as not merely to save its constitutionality but, so far as is consistent with a fair interpretation, not to raise grave doubts on that score. I assume, for the purposes of discussion, although it would be a great and serious step to take, that in some case that seemed to it to need heroic measures, Congress might regulate not only commerce, but instruments of commerce or contracts the bearing of which upon commerce would be only indirect. But it is clear that the mere fact of an indirect effect upon commerce not shown to be certain and very great, would not justify such a law. The point decided in *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 17, was that "the fact that trade or commerce might be indirectly affected was not enough to entitle complainant to a decree." Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce. If the act before us is to be carried out according to what seems to me the logic of the argument for the government, which I do believe that it will be, I can see no part of the conduct of life with which on similar principles Congress might not interfere.

This act is construed by the government to affect the purchasers of shares in two railroad companies because of the effect it may have, or, if you like, is certain to have, upon the competition of these roads. If such a remote result of the exercise of an ordinary incident of property and personal freedom is enough to make that exercise unlawful, there is hardly any transaction concerning commerce between the States that may not be made a crime by the finding of a jury or a court. The personal ascendency of one man may be such that it would give to his advice the effect of a command, if he owned but a single share in each road. The tendency of his presence in the stockholders' meetings might be certain to prevent competition, and thus his advice, if not his mere existence, become a crime.

I state these general considerations as matters which I should have to take into account before I could agree to affirm the decree appealed from, but I do not need them for my own opinion, because when I read the act I cannot feel sufficient

doubt as to the meaning of the words to need to fortify my conclusion by any generalities. Their meaning seems to me plain on their face.

The first section makes "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations" a misdemeanor, punishable by fine, imprisonment or both. Much trouble is made by substituting other phrases assumed to be equivalent, which then are reasoned from as if they were in the act. The court below argued as if maintaining competition were the expressed object of the act. The act says nothing about competition. I stick to the exact words used. The words hit two classes of cases, and only two —Contracts in restraint af trade and combinations or conspiracies in restraint of trade, and we have to consider what these respectively are. Contracts in restraint of trade are dealt with and defined by the common law. They are contracts with a stranger to the contractor's business, (although in some cases carrying on a similar one,) which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would. The objection of the common law to them was primarily on the contractor's own account. The notion of monopoly did not come in unless the contract covered the whole of England. *Mitchel* v. *Reynolds*, 1 P. Wms. 181. Of course this objection did not apply to partnerships or other forms, if there were any, of substituting a community of interest where there had been competition. There was no objection to such combinations merely as in restraint of trade, or otherwise unless they amounted to a monopoly. Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own.

Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized

or attempted to monopolize some portion of the trade or commerce of the realm. See *United States* v. *E. C. Knight Co.*, 156 U. S. 1. All that is added to the first section by § 2 is that like penalties are imposed upon every single person who, without combination, monopolizes or attempts to monopolize commerce among the States; and that the liability is extended to attempting to monopolize any part of such trade or commerce. It is more important as an aid to the construction of § 1 that it is on its own account. It shows that whatever is criminal when done by way of combination is equally criminal if done by a single man. That I am right in my interpretation of the words of § 1 is shown by the words "in the form of trust or otherwise." The prohibition was suggested by the trusts, the objection to which, as every one knows, was not the union of former competitors, but the sinister power exercised or supposed to be exercised by the combination in keeping rivals out of the business and ruining those who already were in. It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared. Further proof is to be found in § 7, giving an action to any person injured in his business or property by the forbidden conduct. This cannot refer to the parties to the agreement and plainly means that outsiders who are injured in their attempt to compete with a trust or other similar combination may recover for it. *W. W. Montague & Co.* v. *Lowry*, — U. S. ——. How effective the section may be or how far it goes, is not material to my point. My general summary of the two classes of cases which the act affects is confirmed by the title, which is "An Act to protect Trade and Commerce against unlawful Restraints and Monopolies."

What I now ask is under which of the foregoing classes this case is supposed to come, and that question must be answered as definitely and precisely as if we were dealing with the indictments which logically ought to follow this decision. The provision of the statute against contracts in restraint of trade has been held to apply to contracts between railroads, otherwise remaining independent, by which they restricted their respective freedom as to rates. This restriction by contract with a stranger to the contractor's business is the ground of the decision in *United States* v. *Joint Traffic Association*, 171

U. S. 505, following and affirming *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290. I accept those decisions absolutely, not only as binding upon me, but as decisions which I have no desire to criticise or abridge. But the provision has not been decided, and, it seems to me, could not be decided without a perversion of plain language, to apply to an arrangement by which competition is ended through community of interest—an arrangement which leaves the parties without external restriction. That provision, taken alone, does not require that all existing competitions shall be maintained. It does not look primarily, if at all, to competition. It simply requires that a party's freedom in trade between the States shall not be cut down by contract with a stranger. So far as that phrase goes, it is lawful to abolish competition by any form of union. It would seem to me impossible to say that the words "every contract in restraint of trade is a crime punishable with imprisonment," would send the members of a partnership between, or a consolidation of, two trading corporations to prison—still more impossible to say that it forbade one man or corporation to purchase as much stock as he liked in both. Yet those words would have that effect if this clause of § 1 applies to the defendants here. For it cannot be too carefully remembered that that clause applies to "every" contract of the forbidden kind—a consideration which was the turning point of the Trans-Missouri Freight Association's case.

If the statute applies to this case it must be because the parties, or some of them have formed, or because the Northern Securities Company is, a combination in restraint of trade among the States, or, what comes to the same thing in my opinion, because the defendants, or some or one of them, are monopolizing or attempting to monopolize some part of the commerce between the States. But the mere reading of those words shows that they are used in a limited and accurate sense. According to popular speech, every concern monopolizes whatever business it does, and if that business is trade between two States it monopolizes a part of the trade among the States. Of course the statute does not forbid that. It does not mean that all business must cease. A single railroad down a narrow valley or through a mountain gorge monopolizes all the railroad transportation through that

valley or gorge. Indeed every railroad monopolizes, in a popular sense, the trade of some area. Yet I suppose no one would say that the statute forbids a combination of men into a corporation to build and run such a railroad between the States.

I assume that the Minnesota charter of the Great Northern and the Wisconsin charter of the Northern Pacific both are valid. Suppose that, before either road was built, Minnesota, as part of a system of transportation between the States, had created a railroad company authorized singly to build all the lines in the State now actually built, owned or controlled by either of the two existing companies. I take it that that charter would have been just as good as the present one, even if the statutes which we are considering had been in force. In whatever sense it would have created a monopoly the present charter does. It would have been a large one, but the act of Congress makes no discrimination according to size. Size has nothing to do with the matter. A monopoly of "any part" of commerce among the States is unlawful. The supposed company would have owned lines that might have been competing—probably the present one does. But the Act of Congress will not be construed to mean the universal disintegration of society into single men, each at war with all the rest, or even the prevention of all further combinations for a common end.

There is a natural feeling that somehow or other the statute meant to strike at combinations great enough to cause just anxiety on the part of those who love their country more than money, while it viewed such little ones as I have supposed with just indifference. This notion, it may be said, somehow breathes from the pores of the act, although it seems to be contradicted in every way by the words in detail. And it has occurred to me that it might be that when a combination reached a certain size it might have attributed to it more of the character of a monopoly merely by virtue of its size than would be attributed to a smaller one. I am quite clear that it is only in connection with monopolies that size could play any part. But my answer has been indicated already. In the first place size in the case of railroads is an inevitable incident and if it were an objection under the act, the Great Northern and the Northern Pacific

already were too great and encountered the law. In the next place in the case of railroads it is evident that the size of the combination is reached for other ends than those which would make them monopolies. The combinations are not formed for the purpose of excluding others from the field. Finally, even a small railroad will have the same tendency to exclude others from its narrow area that great ones have to exclude others from a greater one, and the statute attacks the small monopolies as well as the great. The very words of the act make such a distinction impossible in this case and it has not been attempted in express terms.

If the charter which I have imagined above would have been good notwithstanding the monopoly, in a popular sense, which it created, one next is led to ask whether and why a combination or consolidation of existing roads, although in actual competition, into one company of exactly the same powers and extent, would be any more obnoxious to the law. Although it was decided in *Louisville & Nashville Railroad Co.* v. *Kentucky*, 161 U. S. 677, 701, that since the statute, as before, the States have the power to regulate the matter, it was said, in the argument, that such a consolidation would be unlawful, and it seems to me that the Attorney General was compelled to say so in order to maintain his case. But I think that logic would not let him stop there, or short of denying the power of a State at the present time to authorize one company to construct and own two parallel lines that might compete. The monopoly would be the same as if the roads were consolidated after they had begun to compete—and it is on the footing of monopoly that I now am supposing the objection made. But to meet the objection to the prevention of competition at the same time, I will suppose that three parties apply to a State for charters; one for each of the new and possibly competing lines respectively, and one for both of these lines, and that the charter is granted to the last. I think that charter would be good, and I think the whole argument to the contrary rests on a popular instead of an accurate and legal conception of what the word "monopolize" in the statute means. I repeat, that in my opinion there is no attempt to monopolize, and what, as I have said, in my judgment amounts to the same thing, that

there is no combination in restraint of trade, until something is done with the intent to exclude strangers to the combination from competing with it in some part of the business which it carries on.

Unless I am entirely wrong in my understanding of what a "combination in restraint of trade" means, then the same monopoly may be attempted and effected by an individual and is made equally illegal in that case by § 2. But I do not expect to hear it maintained that Mr. Morgan could be sent to prison for buying as many shares as he liked of the Great Northern and the Northern Pacific, even if he bought them both at the same time and got more than half the stock of each road.

There is much that was mentioned in argument which I pass by. But in view of the great importance attached by both sides to the supposed attempt to suppress competition, I must say a word more about that. I said at the outset that I should assume, and I do assume, that one purpose of the purchase was to suppress competition between the two roads. I appreciate the force of the argument that there are independent stockholders in each; that it cannot be presumed that the respective boards of directors will propose any illegal act; that if they should they could be restrained, and that all that has been done as yet is too remote from the illegal result to be classed even as an attempt. Not every act done in furtherance of an unlawful end is an attempt or contrary to the law. There must be a certain nearness to the result. It is a question of proximity and degree. *Commonwealth* v. *Peaslee*, 177 Mass. 267, 272. So, as I have said, is the amenability of acts in furtherance of interference with commerce among the States to legislation by Congress. So, according to the intimation of this Court, is the question of liability under the present statute. *Hopkins* v. *United States*, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604. But I assume further, for the purposes of discussion, that what has been done is near enough to the result to fall under the law, if the law prohibits that result, although that assumption very nearly if not quite contradicts the decision in *United States* v. *E. C. Knight Co.*, 156 U. S. 1. But I say that the law does not prohibit the result. If it does it must be because there is some further meaning than I have yet discovered in the words "combinations in restraint of trade." I think that I have exhausted the

meaning of those words in what I already have said. But they certainly do not require all existing competitions to be kept on foot, and, on the principle of the Trans-Missouri Freight Association's case, invalidate the continuance of old contracts by which former competitors united in the past.

A partnership is not a contract or combination in restraint of trade between the partners unless the well known words are to be given a new meaning invented for the purposes of this act. It is true that the suppression of competition was referred to in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, but, as I have said, that was in connection with a contract with a stranger to the defendant's business—a true contract in restraint of trade. To suppress competition in that way is one thing, to suppress it by fusion is another. The law, I repeat, says nothing about competition, and only prevents its suppression by contracts or combinations in restraint of trade, and such contracts or combinations derive their character as restraining trade from other features than the suppression of competition alone. To see whether I am wrong, the illustrations put in the argument are of use. If I am, then a partnership between two stage drivers who had been competitors in driving across a State line, or two merchants once engaged in rival commerce among the States whether made after or before the act, if now continued, is a crime. For, again I repeat, if the restraint on the freedom of the members of a combination caused by their entering into partnership is a restraint of trade, every such combination, as well the small as the great, is within the act.

In view of my interpretation of the statute I do not go further into the question of the power of Congress. That has been dealt with by my brother White and I concur in the main with his views. I am happy to know that only a minority of my brethren adopt an interpretation of the law which in my opinion would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms. If that were its intent I should regard calling such a law a regulation of commerce as a mere pretence. It would be an attempt to reconstruct society. I am not concerned with the wisdom of such an attempt, but I believe that Congress was not entrusted by the Constitution with the power to make it and I am deeply persuaded that it has not tried.

[120 *Federal Reporter, p.* 721.]

UNITED STATES *vs.* NORTHERN SECURITIES CO. ET AL.

(Circuit Court, D. Minnesota, Third Division. April 9, 1903.)

No. 789.

1. MONOPOLIES—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—CONSTRUCTION OF ANTI-TRUST LAW.

The generality of the language used in the anti-trust act of 1890 (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), declaring illegal "every contract, combination or conspiracy in restraint of trade or commerce among the several States or with foreign nations," indicates the purpose of Congress to include in the prohibition every combination which directly and substantially restricts interstate commerce, whatever its form.

2. SAME—APPLICATION OF ACT TO INTERSTATE CARRIERS.

The anti-trust act (Act of July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]) applies to interstate carriers of freight and passengers, and any contract or combination which directly and substantially restricts the right of such carrier to fix its own rates, independently of its natural competitors, places a direct restraint upon interstate commerce, in that it tends to prevent competition, and is in violation of the act, whether the rates actually fixed be reasonable or unreasonable.

3. SAME—CORPORATION TO ACQUIRE STOCK OF COMPETING RAILROADS—LEGALITY.

The real control of a corporation is in its stockholders, who have the power to determine all important corporate acts and policies, and any contract or combination by which a majority of the stock of two railroad companies owning and operating parallel and competing interstate lines of road is transferred to a corporation organized for the purpose of holding and voting the same, and receiving the dividends thereon, to be divided *pro rata* among the stockholders of the two companies so transferring their stock, directly and substantially restricts interstate trade and commerce and is in violation of the anti-trust act (Act July 2,

1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), since it destroys any motive for competition between the two roads; and it is immaterial that each company has its own board of directors, which nominally directs its operations and fixes its rates.

4. CORPORATIONS—POWERS—NEW JERSEY STATUTES.
The language of the New Jersey enabling act (Laws 1899, p. 473), authorizing the organization of corporations "for any lawful purpose," imposes a limitation upon the powers of any corporation organized thereunder, however broad may be the terms of its articles of incorporation.

5. SAME—INTERSTATE COMMERCE.
A State cannot invest a corporation organized under its laws with the power to do acts in the corporate name which would operate to restrain interstate commerce.

6. CONSTITUTIONAL LAW—RIGHT OF PRIVATE CONTRACT—LIMITATION BY INTERSTATE COMMERCE CLAUSE.
The constitutional guaranty of liberty to the individual to enter into private contracts is limited to some extent by the commerce clause of the Constitution, and Congress may, in the exercise of the power conferred by such clause, prohibit private contracts which operate to directly and substantially restrain interstate commerce.

7. MONOPOLIES—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—SUIT TO ENJOIN.
The fact that the purpose of an illegal combination between stockholders of two railroad companies operating parallel and competing interstate lines, to secure unity of interest and control of such companies, and to prevent competition, has been accomplished by the formation of a corporation which has acquired the ownership of a majority of the stock of each of the companies, cannot be urged to defeat a suit by the United States to restrain the exercise of the power so illegally acquired by the corporation through such combination, as imposing a restraint upon interstate commerce in violation of the anti-trust law (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]).

8. SAME—DEFENSES—QUESTIONS OF PUBLIC POLICY.
Where the effect of a combination is to directly prevent competition between two parallel and naturally

competing lines of railroad engaged in interstate business, it is in restraint of interstate commerce, and a violation of the anti-trust act (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), and the court, in a suit to enjoin it as such, cannot consider the question whether the combination may not be of greater benefit to the public than competition would be; that being a question of public policy, to be determined by Congress.

In Equity.

Before CALDWELL, SANBORN, THAYER, and TANDEVANTER, Circuit Judges.

THAYER, Circuit Judge. This is a bill, exhibited by the United States, to restrain the violation of an act of Congress approved July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200], entitled "An act to protect trade and commerce against unlawful restraints and monopolies," which is commonly termed the "Sherman Anti-Trust Act." The case was heard before a Circuit Court composed of the four Circuit Judges of the Eighth Circuit, pursuant to the provisions of a recent act of Congress, approved February 11, 1903, which requires such cases to be heard "before not less than three of the Circuit Judges" of the Circuit where the suit is brought, when the Attorney General files with the clerk of the court wherein the case is pending, a certificate that it is one of "general public importance." Such a certificate has been filed, and in accordance with the mandate of the statute the case "has been given precedence over others and in every way expedited."

From admissions made by the pleadings, as well as from much oral testimony, we reach the following conclusions as respects matters of fact:

Two of the defendants, namely, the Northern Pacific Railway Company and the Great Northern Railway Company, are the owners, respectively, of lines of railroad which extend from the cities of Duluth, St. Paul, and Minneapolis, in the State of Minnesota; thence across the continent to Puget Sound. These roads are, and in public estimation have ever been regarded as, parallel and competing lines. For some

years, at least, after they were built, they competed with each other actively for transcontinental and interstate traffic.

In the spring of the year 1901 they united in purchasing about 98 per cent. of the entire capital stock of the Chicago, Burlington & Quincy Railway Company, and became joint sureties for the payment of bonds of the last-named company, whereby the purchase was accomplished, which were to run 20 years, and bear 4 per cent. interest per annum. The amount of the stock so acquired was of the par value of about $107,000,000, and, as it was purchased at the rate of $200 per share, the bonded indebtedness of the two companies was thus increased to the extent of $200,000,000.

Subsequent to the acquisition of the stock of the Burlington Company, and in the summer of the year 1901, certain large and influential stockholders of the Northern Pacific and Great Northern Companies, who had practical control of the two roads, and who have been made parties defendant to the present bill, acting in concert with each other, conceived the design of placing a very large majority of the stock of both of the last-named companies in the hands of a single owner. To this end these stockholders arranged and agreed with each other to procure and cause the formation of a corporation under the laws of the State of New Jersey, which latter company, when organized, should buy all or at least the greater part of the stock of the Northern Pacific and Great Northern Companies. The individuals who conceived and promoted this plan agreed with each other to exchange their respective holdings of stock in the last-named railroad companies for the stock of the New Jersey company, when the same should be fully organized, and to use their influence to induce other stockholders in their respective companies to do likewise, to the end that the New Jersey company might become the sole owner of the whole, or at least a major portion, of the stock of both railroad companies.

In accordance with this plan the defendant the Northern Securities Company (hereafter termed the "Securities Company") was organized under the laws of the State of New Jersey on November 13, 1901, with a capital stock of $400,000,000, that sum being the exact amount required to purchase the total stock of the two railroad companies at the price agreed to be paid therefor. When the Securities Com-

pany was organized, it assented to and became a party to the scheme that had been devised by its promoters before it became a legal entity.

Very shortly after its organization the Securities Company acquired a large majority of all the stock of the Northern Pacific Company at the rate of $115 per share, paying therefor in its own stock at par. At the same time it acquired about 300,000 shares of the stock of the Great Northern Company from those stockholders of that company who had been instrumental in organizing the Securities Company, paying therefor at the rate of $180 per share, and using its own stock at par to make the purchase.

The Securities Company subsequently made further purchases of stock of the Great Northern Company at the same rate, and in about three months had acquired stock of the latter company, amounting at par to about $95,000,000, using for that purpose its own stock to the amount of about $171,000,000. The Securities Company was enabled to make the subsequent purchase of stock from stockholders of the Great Northern Company not immediately concerned in the organization of the Securities Company by the advice, procurement, and persuasion of those stockholders of the Great Northern Company who had been instrumental in organizing the Securities Company, and had exchanged their own stock for stock in that company shortly after its organization. At the present time the Securities Company is the owner of about 96 per cent. of all the stock of the Northern Pacific Company, and the owner of about 76 per cent. of all the stock of the Great Northern Company.

The scheme which was then devised and consummated led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of both companies; second, it destroyed every motive for competition between two roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies; and, according to the familiar rule that every one is presumed to intend what is the necessary consequence of his own acts when done willfully and deliberately, we must conclude that those who conceived

and executed the plan aforesaid intended, among other things, to accomplish these objects.

The general question of law arising upon this state of facts is whether such a combination of interests as that above described falls within the inhibition of the anti-trust act or is beyond its reach. The act brands as illegal "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations." Learned counsel on both sides have commented on the general language of the act, doing so, of course, for a different purpose, and the generality of the language employed is, in our judgment, of great significance. It indicates, we think, that Congress, being unable to foresee and describe all the plans that might be formed and all the expedients that might be resorted to to place restraints on interstate trade or commerce, deliberately employed words of such general import as, in its opinion, would comprehend every scheme that might be devised to accomplish that end.

What is commonly termed a "trust" was a species of combination organized by individuals or corporations for the purpose of monopolizing the manufacture of or traffic in various articles and commodities, which was well known and fully understood when the anti-trust act was approved. Combinations in that form were accordingly prohibited; but Congress, evidently anticipating that a combination might be otherwise formed, was careful to declare that a combination in any other form, if in restraint of interstate trade or commerce—that is, if it directly occasioned or effected such restraint—should likewise be deemed illegal.

Moreover, in cases arising under the act, it has been held by the highest judicial authority in the nation, and its opinion has been reiterated in no uncertain tone, that the act applies to interstate carriers of freight and passengers as well as to all other persons, natural or artificial; that the words "in restraint of trade or commerce" do not mean in unreasonable or partial restraint of trade or commerce, but any direct restraint thereof; that an agreement between competing railroads, which requires them to act in concert in fixing the rate for the carriage of passengers or freight over their respective lines from one State to another, and which, by that means, restricts temporarily the right of any one of such carriers

to name such rates for the carriage of such freight or passengers over its road as it pleases, is a contract in direct restraint of commerce within the meaning of the act, in that it tends to prevent competition; that it matters not whether, while acting under such a contract, the rate fixed is reasonable or unreasonable, the vice of such a contract or combination being that it confers the power to establish unreasonable rates, and directly restrains commerce by placing obstacles in the way of free and unrestricted competition between carriers who are natural rivals for patronage; and, finally, that Congress has the power, under the grant of authority contained in the Federal Constitution, to regulate commerce, to say that no contract or combination shall be legal which shall restrain interstate trade or commerce by shutting off the operation of the general law of competition. United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; United States *v.* Joint Traffic Ass'n, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136.

Taking the foregoing propositions for granted, because they have been decided by a court whose authority is controlling, it is almost too plain for argument that the defendants would have violated the anti-trust act if they had done, through the agency of natural persons, what they have accomplished through an artificial person of their own creation. That is to say, if the same individuals who promoted the Securities Company, in pursuance of a previous understanding or agreement so to do, had transferred their stock in the two railroad companies to a third party or parties, and had agreed to induce other shareholders to do likewise, until a majority of the stock of both companies had been vested in a single individual or association of individuals, and had empowered the holder or holders to vote the stock as their own, receive all the dividends thereon, and prorate or divide them among all the shareholders of the two companies who had transferred their stock—the result would have been a combination in direct restraint of interstate commerce, because it would have placed in the hands of a small coterie of men the power to suppress competition be-

tween two competing interstate carriers, whose lines are practically parallel.

It will not do to say that, so long as each railroad company has its own board of directors, they operate independently, and are not controlled by the owner of the majority of their stock. It is the common experience of mankind that the acts of corporations are dictated and their policy is controlled by those who own the majority of their stock. Indeed, one of the favorite methods in these days, and about the only method, of obtaining control of a corporation, is to purchase the greater part of its stock. It was the method pursued by the Northern Pacific and Great Northern Companies to obtain control of the Chicago, Burlington & Quincy Railroad; and, so long as directors are chosen by stockholders, the latter will necessarily dominate the former, and in a real sense determine all important corporate acts.

The fact that the ownership of a majority of the capital stock of a corporation gives one the mastery and control of the corporation was distinctly recognized and declared in Pearsall *v.* Great Northern Railway, 161 U. S. 646, 671, 16 Sup. Ct. 705, 710, 40 L. Ed. 838. The same fact has been recognized and declared by other courts. Pennsylvania R. Co. *v.* Commonwealth (Pa.) 7 Atl. 368, 371; Farmers' Loan & Trust Co. *v.* New York & Northern Railway Co., 150 N. Y. 410, 425, 44 N. E. 1043, 34 L. R. A. 76; People *ex rel. v.* Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 802, 8 L. R. A. 497, 17 Am. St. Rep. 319. In opposition to this view counsel cite Pullman Car Co. *v.* Missouri Pacific Co., 115 U. S. 587, 596, 6 Sup. Ct. 194, 29 L. Ed. 499, but in that case the meaning of the word "controlled," as used in a private contract, was the point under consideration, and what was said on the subject cannot be held applicable to cases arising under the anti-trust act, when the point involved is whether the ownership of all the stock of two competing and parallel railroads vests the owner thereof with the power to suppress competition between such roads. We entertain no doubt that it does. Indeed, we regard the suppression of competition, and to that extent a restraint of commerce, as the natural and inevitable result of such ownership.

What has been done through the organization of the Securities Company accomplishes the object which Congress has

denounced as illegal more effectually, perhaps, than such a combination as is last supposed. That is to say, by what has been done the power has been acquired (and provision made for maintaining it) to suppress competition between two interstate carriers who own and operate competing and parallel lines of railroad. Competition, we think, would not be more effectually restrained than it now is under and by force of the existing arrangement if the two railroad companies were consolidated under a single charter.

It is manifest, therefore, that the New Jersey charter is about the only shield which the defendants can interpose between themselves and the law. The reason which led to the acquisition of that charter would seem to have been that while, as individuals, the promoters could not, by agreement between themselves, place the majority of the stock of the two competing and parallel railroads in the hands of a single person or a few persons, giving him or them the power to operate the roads in harmony, and stifle competition, yet that the same persons might create a purely fictitious person termed a corporation, which could neither think nor act except as they directed, and, by placing the same stock in the name of such artificial being, accomplish the same purpose. The manifest unreasonableness of such a proposition, and the grave consequences sure to follow from its approval, compel us to assume that it must be unsound, especially when we reflect that the law, as administered by courts of equity, looks always at the substance of things—at the object accomplished, whether it be lawful or unlawful—rather than upon the particular devices or means by which it has been accomplished.

So far as the New Jersey charter is concerned, the question, broadly stated, which the court has to determine, is whether a charter granted by a State can be used to defeat the will of the national legislature as expressed in a law relating to interstate trade and commerce over which Congress has absolute control. Presumptively, at least, no charter granted by a state is intended by the State to have that effect or to be used for such a purpose; and in the present instance it is clear that the State of New Jersey did not intend to grant a charter under cover of which an object denounced by Congress as unlawful, namely, a combination conferring the power to restrain

interstate commerce might be formed and maintained because the enabling act under which the Securities Company was organized expressly declares that three or more persons may avail themselves of the provisions of the act and "become a corporation for any lawful purpose." Laws N. J. 1899, p. 473. This language is not merely perfunctory. It means, obviously, that, whatever powers the incorporators saw fit to assume, they must hold and exercise for the accomplishment of lawful objects. The words in question operate, therefore, as a limitation upon all the powers enumerated in the articles of association which were filed by the promoters of the Securities Company, so that, however extensive and comprehensive these powers may seem to be, the State of New Jersey has said, "You shall not exercise them so as to set at defiance any statute lawfully enacted by the Congress of the United States, or any statute lawfully enacted by any State wherein you see fit to exercise your powers."

But aside from this view of the subject, if the State of New Jersey had undertaken to invest the incorporators of the Securities Company with the power to do acts in the corporate name which would operate to restrain interstate commerce, and for that reason could not be done by them acting as an association of individuals, then we have no doubt that such a grant would have been void under the provisions of the anti-trust act, or at least that the charter could not be permitted to stand in the way of the enforcement of that act.

The power of Congress over interstate commerce is supreme, far-reaching, and acknowledges no limitations other than such as are prescribed in the Constitution itself. Gibbons *v.* Ogden, 9 Wheat. 1, 197, 6 L. Ed. 23; County of Mobile *v.* Kimball, 102 U. S. 691, 696, 697, 26 L. Ed. 238; Champion *v.* Ames (decided Feb. 23, 1903) 23 Sup. Ct. 321, 47 L. Ed. ——. No legislation on the part of a State can curtail or interfere with its exercise; and, in view of repeated decisions, no one can deny that it is a legitimate exercise of the power in question for Congress to say that neither natural nor artificial persons shall combine or conspire in any form whatever to place restraints on interstate trade or commerce. United States *v.* Trans-Missouri Freight Association, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; United States *v.* Joint Traffic Association, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259;

Addystone Pipe & Steel Co. *v.* United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136.

It is urged, however, that such a combination of adverse interests as was formed, and has been heretofore described, was lawful and not prohibited by the anti-trust act, because such restraint upon interstate trade or commerce, if any, as it imposes, is indirect, collateral, and remote, and hence that the combination is not one of that character which the Congress of the United States can lawfully forbid. The following cases are relied upon to sustain the contention: United States *v.* E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; Hopkins *v.* United States, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; Anderson *v.* United States, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300. It is pertinent, therefore, to inquire in what way the existing combination that has been formed does affect interstate commerce. It affects it, we think, by giving to a single corporate entity, or, more accurately, to a few men acting in concert and in its name and under cover of its charter, the power to control all the means of transportation that are owned by two competing and parallel railroads engaged in interstate commerce; in other words, the power to dictate every important act which the two companies may do, to compel them to act in harmony in establishing interstate rates for the carriage of freight and passengers, and generally to prescribe the policy which they shall pursue. It matters not, we think, through how many hands the orders come by which these aims are accomplished, or through what channels. The power was not only acquired by the combination, but it is effectually exercised, and it operates directly on interstate commerce, notwithstanding the manner of its exercise, by controlling the means of transportation, to wit, the cars, engines, and railroads by which persons and commodities are carried, as well as by fixing the price to be charged for such carriage.

The cases cited above, and on which reliance is placed to sustain the view that the restraint imposed is merely indirect, remote, incidental, or collateral, are not relevant, for, as was fully explained in Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211, 238, 240, 243, 20 Sup. Ct. 96, 44 L. Ed. 136, one of these cases (United States *v.* E. C. Knight Company) dealt only with a combination within a State to obtain a practical

monopoly of the manufacture of sugar, and it was held that the combination only related to manufacture, and not to commerce among the States or with foreign nations; that the fact that an article was manufactured for export to another State did not make it an article of interstate commerce before transportation had been begun, or necessarily subject it to Federal control; and that the effect of the combination then under consideration on interstate commerce was at most only incidental and collateral. But while commenting on its previous decision in United States *v.* E. C. Knight Co., the court took occasion to say, in Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 246, 20 Sup. Ct. 96, 44 L. Ed. 136, that, when a contract is made for the sale and delivery of an article in another State, the transaction is one of interstate commerce, although the vendor has also agreed to manufacture the article so sold, and that combinations to control and monopolize such transactions would be in restraint of interstate commerce.

In the other cases (Hopkins *v.* United States and Anderson *v.* United States) it was held that the business of the members of the Kansas City Live Stock Exchange, which was under consideration by the court, was not interstate commerce and that the act did not affect them, and that, even if they were so affected, the particular agreement which was involved did not operate as a restraint of interstate commerce.

We fail to find in either of these cases any suggestion that a combination such as the one in hand, the object and necessary effect of which is to give to a single person or to a coterie of persons full control of all the means of transportation owned by two competing and parallel lines of road engaged in interstate commerce, as well as the power to fix the rate for the transportation of persons and property, does not directly and immediately affect interstate commerce. No combination, as it would seem, could more immediately affect it.

Again, it is urged tentatively that, if the existing combination which the government seeks to have dissolved is held to be one in violation of the anti-trust act and unlawful, then the act unduly restricts the right of the individual to make contracts, buy and sell property, and is invalid for that reason. With reference to this contention it might be suggested (as it has been by the government) that, as the situs of the stock which the Securities Company has bought is in the States of

Wisconsin and Minnesota, which respectively chartered the Northern Pacific and Great Northern Companies, and as the stock owes its being to the laws of those States, and as each State has forbidden the consolidation of competing and parallel lines of railroad therein, and has likewise prohibited any consolidation of the "stock and franchises" of such roads, the contention last mentioned is entitled to little consideration in the case at bar.

But waiving and ignoring this suggestion, the argument advanced in behalf of the defendants is met and answered, so far as this court is concerned, by the decision in Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 228, 229, 20 Sup. Ct. 96, 102, 44 L. Ed. 136, where it is said, *inter alia:*

"Under this grant of power to Congress (the power to regulate commerce between the several States and with foreign nations), that body in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate, to any substantial extent, interstate commerce. * * * We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts, limits the power of Congress and prevents it from legislating on the subject of contracts of the class mentioned. * * * It has been held that the word 'liberty,' as used in the Constitution, was not to be confined to the mere liberty of persons, but included, among others, a right to enter into certain classes of contracts for the purpose of enabling the citizen to carry on his business. * * * But it has never been, and in our opinion ought not to be held, that the word included the right of an individual to enter into private contracts upon all subjects, no matter what their nature, and wholly irrespective, among other things of the fact that they would, if performed, result in the regulation of interstate commerce, and in violation of an act of Congress upon that subject. The provision of the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the States. On the contrary, we think the provision regarding the liberty of the citizen is to some extent limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those

private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate to a greater or less degree commerce among the States. We cannot so enlarge the scope of the language of the Constitution regarding the liberty of the citizen as to hold that it includes, or that it was intended to include, a right to make a contract which in fact restrained and regulated interstate commerce, notwithstanding Congress, proceeding under the constitutional provision giving to it the power to regulate that commerce, had prohibited such contracts."

These observations, as a matter of course, preclude further controversy over the power of Congress to limit to some extent the right to make contracts when enacting laws for the regulation of commerce between the States.

Learned counsel for the defendants further contend as follows: That the anti-trust act was not intended to include or prohibit combinations looking to the virtual consolidation of parallel and competing lines of railroad, although such a combination operates to stifle competition; that no relief can be granted to the government in this instance, because the combination or conspiracy of which it complains has accomplished its purpose, to wit, the organization of the Securities Company and the lodgment of the majority of the stock of the two railroads in its hands before the bill was filed; and, finally, that the combination proven was one "formed in aid of commerce and not to restrain it;" in other words, that it was one formed to enlarge the volume of interstate traffic and thus benefit the public.

The court cannot assent to either of these propositions.

The first, we think, is clearly untenable for the reason already stated and fully disclosed in the decisions heretofore cited.

Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the anti-trust act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it. Obviously the act, when fairly interpreted, will bear no such

construction. Congress aimed to destroy the power to place any direct restraint on interstate trade or commerce, when by any combination or conspiracy, formed by either natural or artificial persons, such a power had been acquired; and the government may intervene and demand relief as well after the combination is fully organized as while it is in process of formation. In this instance, as we have already said, the Securities Company made itself a party to a combination in restraint of interstate commerce, that antedated its organization as soon as it came into existence, doing so, of course, under the direction of the very individuals who promoted it.

Relative to the third contention, which has been pressed with great zeal and ability, this may be said: It may be that such a virtual consolidation of parallel and competing lines of railroad as has been effected, taking a broad view of the situation, is beneficial to the public rather than harmful. It may be that the motives which inspired the combination by which this end was accomplished were wholly laudable and unselfish; that the combination was formed by the individual defendants to protect great interests which had been committed to their charge; or it may be that the combination was the initial and necessary step in the accomplishment of great designs, which, if carried out as they were conceived, would prove to be of inestimable value to the communities which these roads serve and to the country at large.

We shall neither affirm nor deny either of these propositions, because they present issues which we are not called upon to determine, and some of them involve questions which are not within the province of any court to decide, involving, as they do, questions of public policy which Congress must determine. It is our duty to ascertain whether the proof discloses a combination in direct restraint of interstate commerce; that is to say, a combination whereby the power has been acquired to suppress competition between two or more competing and parallel lines of railroad engaged in interstate commerce. If it does disclose such a combination, and we have little hesitation in answering this question in the affirmative, then the anti-trust act, as it has been heretofore interpreted by the court of last resort, has been violated, and the government is entitled to a decree.

A decree in favor of the United States will accordingly be entered to the following effect: Adjudging that the stock of the Northern Pacific and Great Northern Companies, now held by the Securities Company, was acquired in virtue of a combination among the defendants in restraint of trade and commerce among the several States, such as the anti-trust act denounces as illegal; enjoining the Securities Company from acquiring or attempting to acquire further stock of either of said companies; also enjoining it from voting such stock at any meeting of the stockholders of either of said railroad companies, or exercising or attempting to exercise any control, direction, supervision, or influence over the acts of said companies or either of them by virtue of its holding such stock; enjoining the Northern Pacific and Great Northern Companies, respectively, their officers, directors and agents from permitting such stock to be voted by the Northern Securities Company, or any of its agents or attorneys on its behalf, at any corporate election for directors or officers of either of said companies; and likewise enjoining them from paying any dividends to the Securities Company on account of said stock, or permitting or suffering the Securities Company to exercise any control whatsoever over the corporate acts of said company, or to direct the policy of either; and, finally, permitting the Securities Company to return and transfer to the stockholders of the Northern Pacific and Great Northern Companies any and all shares of stock of those companies which it may have received from such stockholders in exchange for its own stock, or to make such transfer and assignment to such person or persons as are now the holders and owners of its own stock originally issued in exchange for the stock of said companies.

UNITED STATES OF AMERICA v. THE NORTHERN SECURITIES COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, JAMES J. HILL, WILLIAM P. CLOUGH, D. WILLIS JAMES, JOHN S. KENNEDY, J. PIERPONT MORGAN, ROBERT BACON, GEORGE F. BAKER and DANIEL LAMONT.	C. Equity No. 789.

DECREE.

This cause came on to be heard at this Term and was argued by counsel (Hon. Philander C. Knox, the Attorney-General; Mr. D. T. Watson, special counsel; Mr. James M. Beck and Mr. W. A. Day, Assistant Attorneys-General, and Mr. John M. Freeman appearing for the United States, and Mr. George B. Young, Mr. John W. Griggs, Mr. M. D. Grover, Mr. C. W. Bunn, Mr. Francis Lynde Stetson, and Mr. David Willcox appearing for the defendants); and thereupon upon consideration of the evidence and the arguments,

It was ordered, adjudged and decreed as follows, to wit: That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," denounces as illegal; that all of the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, now claimed to be held and owned by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States; that the Northern Securities Company, its officers, agents, servants, and employees, be, and they are

hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from voting at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents be, and they are hereby, respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company or in its behalf by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies.

It is further ordered and adjudged that the United States recover of and from the defendants its costs herein expended, the same to be taxed by the Clerk of this Court, and have execution therefor.

HENRY C. CALDWELL,
Presiding Judge.
WALTER H. SANBORN,
AMOS M. THAYER,
Circuit Judges.

A true record.
Attest:

HENRY D. LANG,
Clerk.

CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MINNESOTA,

THIRD DIVISION.

UNITED STATES OF AMERICA

v.

THE NORTHERN SECURITIES COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, JAMES J. HILL, WILLIAM P. CLOUGH, D. WILLIS JAMES, JOHN S. KENNEDY, J. PIERPONT MORGAN, ROBERT BACON, GEORGE F. BAKER and DANIEL LAMONT.

Mr. William D. Guthrie, Mr. R. S. Lovett, Mr. Maxwell Evarts and Mr. John D. Baldwin, (Mr. John F. Dillon was with them on the brief) for the petitioners.

Mr. Elihu Root, Mr. John G. Johnson, Mr. Frank B. Kellogg and Mr. C. A. Severance for the Northern Securities Company.

Hon. P. C. Knox, Attorney-General, for the United States.

Before SANBORN, THAYER, VAN DEVANTER and HOOK, Circuit Judges.

THAYER, Circuit Judge, stated the conclusions of the Court.

This is an application by Edward H. Harriman and Winslow S. Pierce and the Oregon Short Line Railroad Company for leave to intervene *pro interesse suo* in the case of The United States *vs.* The Northern Securities Company and others. The case in which they seek to intervene has already passed to a final decree, and the decree has been affirmed recently by the Supreme Court of the United States.

The petitioners state as the ground of their application that Harriman and Pierce, as Trustees for the Oregon Short

Line Railroad Company, are the registered owners of $82,491,-871 in par value of the stock of the Northern Securities Company which was originally issued to them in exchange for common and preferred stock of the Northern Pacific Railway Company; that since the decree was affirmed by the Supreme Court the directors of the Securities Company have formulated a scheme for the reduction of the capital stock of that Company to the extent of ninety-nine per cent., and are about to submit the scheme for approval to the stockholders of the Company, that the plan so proposed contemplates that the stockholders of the Securities Company shall surrender ninety-nine per cent, of the stock of that Company which they respectfully hold, each stockholder receiving in exchange $39.27 in stock of the Northern Pacific Railway Company and $30.17 in preferred stock of the Great Northern Railway Company for each share of the Securities stock so surrendered; that the petitioners Harriman and Pierce are able to return the shares of stock in the Securities Company which they originally received from that Company in exchange for Northern Pacific stock; and, as they verily believe, that the proposed plan of distribution if carried out will vest a majority of the stock of the Great Northern and Northern Pacific Railway Companies in the same individuals who co-operated in the forming of the Securities Company and would continue the common management of the two competing railway companies and render the decree of this Court ineffectual and defeat its true purpose.

Applications for leave to intervene in a case, after the entry of a final decree, are very unusual.

They are never granted as a matter of course, and owing to the tendency of such applications to occasion delay and prolong the existing litigation, they ought not to be granted unless it is necessary to do so to preserve some right which cannot otherwise be protected or to avoid some complication that is liable to arise.

The principal ground as it seems on which the petitioners Harriman and Pierce base their application to intervene, is that it is necessary to the due enforcement of the decree that they should be admitted into the cause as parties and be allowed to raise further issues and obtain further orders.

It is undoubtedly true that a supplemental bill may be

filed in a case after a final decree for the purpose of fully executing it, when, after the decree is entered, some action has been taken or unforeseen events have occurred which will prevent its enforcement unless some further orders or directions are given (*Root* v. *Woolworth*, 150 U. S. 401, 411; *Minnesota Company* v. *St. Paul Company*, 2 Wall. 609), but we fail to perceive that further orders are necessary in the case in hand to insure the due execution of the decree according to its terms. The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential. In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued and to surrender the stock of the two Railway Companies in exchange for which its stock had been issued. This prayer for relief was denied. The Court doubted its power to command stockholders of the Securities Company, who had not been served with process and were not before the Court otherwise than by representation (if indeed they were present by representation), to surrender stock which was in their possession and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two Railway Companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The Government was satisfied with the relief which it obtained and expresses itself as fully satisfied therewith at the present time. When the decree was entered it was assumed by the Court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that Company would be able and likewise disposed to make some disposition of the stock which under all the circumstances of the case would be fair and just and would restore it to the markets of the world where it would have some value instead of being a worthless commodity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that if any controversy arose in the discharge of this function, in view of the situation that

had been created by the decree, it would be a controversy that would properly form the subject matter of an independent suit between the parties immediately interested. It is true that the decree contained a provision in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said Railway Companies which the Northern Securities Company had acquired in exchange for its own stock and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become the owners of its own stock originally issued in exchange for stock in the two Railway Companies. But this provision was merely permissive. It did not command that the stock should be returned or exclude other methods of disposing of it that in view of all the circumstances, might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two Railway Companies in a manner somewhat different from that which was tentatively suggested by the decree but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has now become final by affirmance and make an order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do.

The application for leave to intervene contains the further suggestion, made on information and belief only, that the proposed plan of disposing of the stock of the Northern Pacific and Great Northern Railway Companies would result in leaving the control of the two railroads in the hands of persons who co-operated in forming the Securities Company and that the petitioners should be permitted to intervene and obtain further orders to prevent such a result. The Securities Company meets this suggestion by the presentation of affidavits and excerpts from its records which tend to show that the proposed plan of distribution will not have the effect last men-

tioned but will lead to a very wide distribution of the stock of the two Companies, while the scheme which the petitioners have in view, if consummated by an intervention, will have the effect of placing the control of the Northern Pacific Railway Company in the hands of the owner of a parallel and competing road, to wit, the Union Pacific Railway Company. But the issues suggested by these affidavits and excerpts are disputed and debatable questions of fact which the parties would be entitled to litigate with witnesses and evidence after leave to intervene had been granted and we decline to consider them or the affidavits or excerpts which present them upon this motion. We consider and determine this application upon the petition for leave to intervene alone. The United States is the complainant in this case. It is the conservator of the public welfare and has the right to speak for the public. According to well established rules the petitioners cannot intrude into this litigation merely to protect the public interest or as *amici curiæ*, so long as the Government is present by its Attorney General and expresses its disapproval of such intrusion. This would be wresting from the Government that control over the litigation, so far as the public is concerned, which it has the right to exercise. The petitioners can intervene only for the protection of their own individual interests and for that purpose only in the event that they can obtain adequate protection in no other way. The United States, speaking by its Attorney General, says that it "neither admits nor denies the allegations of the petition but objects to the proposed intervention. This case was heard before this Court on bill, answer and testimony and a final decree was entered enjoining the defendants as therein recited. Upon appeal by the defendants to the Supreme Court of the United States the decree of this Court was affirmed in every particular, the effect of which was to end and close the case. The United States stands on the decree as affirmed and submits that the Court is only concerned to see that it is faithfully observed by the defendants according to its terms." In view of this declaration on the part of the United States it is to be presumed that the Government is disposed to permit the stockholders of the Securities Company to formulate some plan for the equitable disposition of the stock of the two Railway Companies if they can do so, which will not be in violation of law, feeling confi-

dent of its ability to dissolve any future combination in restraint of interstate commerce, should one in fact result from any scheme that may be devised for the disposition of the stock of the two companies and preferring to challenge the validity of a .y such combination by an independent bill rather than by further proceedings in this case.

It was further contended in argument that the stock of the Northern Pacific and Great Northern Railway Companies now standing in the name of the Securities Company, was placed *in custodia legis* by the filing of the Government's bill in this case, that it has never been released from such custody, although a final decree has been entered, and that on this ground the petitioners, who assert a right to have particular shares of stock of the Northern Pacific Company returned to them, are entitled to intervene. This argument does not impress us favorably. It may be conceded that so long as property remains actually in judicial custody any one asserting a right thereto or interest therein may intervene, although the case in virtue of which judicial custody was acquired has passed to a final decree. *In Matters of Howard*, 9 Wall. 175, 184, and cases cited, *Williams* v. *Morgan*, 111 U. S. 684. It is a well-settled doctrine that when a court has acquired the custody of property, persons who assert an interest therein have a right to apply to that court for relief, and as a general rule cannot obtain relief elsewhere. This Court, however, has never assumed the custody of the stock of the Northern Pacific and Great Northern Companies, but has studiously refrained from so doing.

It did not assume to direct what should be done with the stock in question when it enjoined the Securities Company from voting it and the Railway Companies from paying dividends thereon to the Securities Company. Nor was the bill, which was filed by the Government, one that placed the stock in judicial custody when it was filed. It was a proceeding strictly *in personam* which prayed the Court to enjoin the use of the stock for the accomplishment of certain unlawful objects and the relief granted was confined to that end. The intervention cannot be allowed on the ground last stated. Our conclusion is that the petitioners should not be allowed to intervene and import into the case new issues to be tried. The due enforcement of the decree does not necessitate such action and if it so happens that the decree of this Court in favor of

the Government creates a situation which shall give rise to controversies between stockholders of the Securities Company as to how the holdings of that Company in the two Railway Companies ought to be distributed or what should be done with such holdings, these are questions which can be settled among the stockholders themselves, who are more immediately concerned in these questions, and according to those principles of law and equity which any Court having general common law and equity powers, is competent to enforce.

Leave to intervene is denied.